

No. 15528

United States
Court of Appeals
for the Ninth Circuit

UNITED MERCURY MINES COMPANY, a Corporation,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States

FILED

JUL 15 1957

PAUL P. O'BRIEN, CLERK

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NAMES AND ADDRESSES OF ATTORNEYS

JOHN A. CARVER, JR.,

Cont. Bank Building,

Boise, Idaho;

DALE CLEMONS,

Idaho Building,

Boise, Idaho,

For the Petitioner.

CHARLES K. RICE,

Assistant U. S. Attorney General,

Tax Division, Dept. of Justice,

Washington 25, D. C.;

NELSON P. ROSE,

Chief Counsel, Internal Revenue Service,

Washington 25, D. C.,

For the Respondent.

1956

- May 2—Hearing had before Judge LeMire on merits. Stipulation of facts filed at hearing. Appearance of Dale Clemons, as counsel, filed at hearing. Petitioner's brief 7/2/56. Respondent's brief 8/16/56. Petitioner's reply 9/5/56.
- May 29—Transcript of hearing 4/30/56, 5/2/56, filed.
- July 2—Brief filed by petitioner. 7/2/56, served.
- Aug. 14—Motion for extension of time to 10/1/56, to file brief, filed by respondent. 8/16/56, granted. 8/20/56, served.
- Sept. 25—Motion for extension of time to 10/22/56, to file brief, filed by respondent. 9/26/56, granted. 9/27/56, served.
- Oct. 22—Respondent's brief in answer, filed. 10/23/56, served.
- Nov. 2—Motion to extend time to 12/3/56, to file reply brief, filed by petitioner. 11/2/56, granted. 11/5/56, served.
- Dec. 3—Reply brief filed by petitioner. 12/3/56, served.
- Dec. 26—Memorandum findings of fact and opinion filed, LeMire J. Decision will be entered for respondent. 12/26/56, served.
- Dec. 26—Decision entered, Judge LeMire. 12/28/56, served.

1956

Mar. 22—Petition for review by United States Court of Appeals, Ninth Circuit, filed by petitioner.

Mar. 22—Certificate of service filed by petitioner.

Apr. 9—Designation of contents of record filed by petitioner.

[Title of Tax Court and Cause.]

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in the Notice of Deficiency (Ap:P:AA:HH90:DMK) dated February 1, 1955, and as a basis of its proceedings alleges as follows:

I.

Petitioner is a corporation duly organized under the laws of the State of Idaho with its principal place of business at P. O. Box 448, Boise, Idaho. The return for the period here involved, being the calendar year 1944, was duly filed on the 9th day of March, 1945, with the Collector of Internal Revenue for the District of Idaho.

II.

The Notice of Deficiency, copy of which is attached and marked Exhibit "A," was mailed to petitioner on February 1, 1955.

III.

The taxes in controversy are excess profits tax for the calendar year 1944 in the amount of \$113,453.68, and income tax for the calendar year 1944 (over-assessment) in the amount of \$57,071.69. Tax liability for the calendar year 1945 is computed in the Notice of Deficiency, but involves no controversy.

IV.

The determination of tax set forth in said Notice of Deficiency is based upon the following error:

The Commissioner erred in denying to taxpayer the exemption from excess profits tax provided in Section 731 of the Internal Revenue Code of 1939, as amended.

V.

The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The taxpayer was engaged in mining, for the production of the income as to which excess profits tax liability is asserted, during the year 1944.

(b) The revenue, the subject of the deficiency assessment, was derived from the production of strategic minerals, to wit, antimony and tungsten, from certain mining properties in Valley County, Idaho.

(c) These mining properties were located under the mining laws of the United States and the State of Idaho or acquired by purchase by J. J. Oberbillig and by him transferred to the petitioner, or predecessor corporations, which in turn transferred

them to petitioner. By 1921, Mr. Oberbillig had title or option on the key or controlling properties for all of the field upon which the production here in question occurred.

(d) From the dates of location to the years in question, and subsequently to the present date, petitioner has (with specific reference to the properties from which the 1944 production was obtained, and related properties):

1. Maintained continuing activities for the discovery and blocking out of ore reserves;

2. Performed exploration work and secured its performance, including shafts, tunnels, drifts, and drilling;

3. Developed and assisted in the development of the properties, including road and building construction and mine construction, and assistance in transmission line construction, road maintenance, clearing, and the like;

4. At various times, extracted, and sold or stock-piled strategic minerals.

(e) From 1927 to 1941, there were a series of contracts between petitioner and Bradley Mining Company, or its predecessors. The contract in effect in 1944 was executed December 31, 1941. Under each of the contracts, and particularly in the contract of December 31, 1941, the petitioner maintained an economic interest in the ore in place.

(f) Petitioner performed developmental work subsequent to December 31, 1941, on properties described in that agreement, including

1. Road building, power line building, and discovery and blocking out of ores, on properties already conveyed; and

2. General developmental work on properties upon which Bradley had an option and which were transferred without additional consideration in 1943;

3. Further general development and crosscutting work on properties subject to option which were transferred in 1947. This work was done in 1944.

(g) Petitioner, by the beginning of 1944, had a capital commitment in discovery, exploration and development work in these properties exceeding \$400,000.00.

(h) Petitioner, during 1944 and 1945, and for many years prior and subsequent thereto, has been a producing company operating other properties for the production of strategic minerals in the same general location as those above referred to.

Wherefore, petitioner prays that this Court may hear the proceeding and determine that the deficiency assessment is without authority of law, and grant such other and further relief as to the Court shall seem meet and proper.

/s/ JOHN A. CARVER, JR.,
Attorney for Petitioner.

State of Idaho,
County of Ada—ss.

J. J. Oberbillig, being duly sworn, says that he is the president of United Mercury Mines Company, a

corporation, petitioner above named, and as such president he is duly authorized to verify the foregoing petition; that he has read the foregoing petition and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

/s/ J. J. OBERBILLIG.

Subscribed and sworn to before me this 21st day of April, 1955.

[Seal] /s/ JOHN A. CARVER, JR.,
Notary Public for Idaho.

Form 1231 (App)

U. S. Treasury Department
Internal Revenue Service
Regional Commissioner

P. O. Box 3935
Portland 8, Oregon

In replying
refer to:

Ap:P:AA:HH
90D:IMK

United Mercury Mines Co.,
P. O. Box 448,
Boise, Idaho.

Gentlemen:

You are advised that the determination of your excess profits tax liability for the taxable year

ended December 31, 1944, discloses a deficiency of \$113,453.68 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with the Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellant, P. O. Box 3935, Portland 8, Oregon. The signing and filing of this form will expedite the closing of your case by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earlier.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner.

By A. N. WILLIAMS,
Associate Chief, Appellate
Division.

Enclosures:

Statement
Form 1276
Agreement Form

Statement

United Mercury Mines Co.
P. O. Box 448
Boise, Idaho

Tax liability for the taxable years ended December 31, 1944,
and December 31, 1945.

Year	Income Tax	Overassessment
	Deficiency	
1944.....	None	(\$57,071.69)
1945.....	None	None
Total	None	(\$57,071.69)

Declared Value Excess-Profits Tax		
1944.....	None	None
1945.....	None	None

Excess-Profits Tax		
1944.....	\$113,453.68	None
1945.....	None	None
Total	\$113,453.68	None

In making this determination of your tax liability, careful consideration has been given to the report of examination transmitted to you March 14, 1952, to your protest received October 10, 1952, and to the statements made by your authorized representatives in conferences August 6, 1953, January 20, 1954, and November 23, 1954.

The 80% limitation is applicable to the year 1944, the only year in which there is excess profits tax liability. Due to the effect of the 80% limitation the carryback of the 1946 unused excess profits credit does not decrease the 1944 tax liability.

The overassessment shown herein should not be regarded as finally determined. When final determination has been made, the overassessment to the extent of the amount allowable will be made the subject of a certificate of overassessment, which will reach you in due course through the office of the District Director of Internal Revenue for your district, and will be applied by that official in accordance with Section 322(a) of the Internal Revenue Code (1939) provided that you have fully protected yourself against the running of the statute of limitations with respect to the apparent overassessment referred to in this letter, by filing with the District Director of Internal Revenue for your district a timely claim for refund on Form 843.

A copy of this letter and statement has been mailed to your representative, Mr. John A. Carver, Jr., Continental Bank Building, Boise, Idaho, in accordance with the authority contained in the power of attorney executed by you.

Taxable Year Ended December 31, 1944

Adjustments to Net Income

Net income disclosed by return for declared value	
excess profits tax	\$167,781.09
Additional income and unallowable deductions:	
(a) Antimony Ridge loss	2,500.00
	<hr/>
Adjusted net income for declared value excess	
profits tax	\$170,281.09
	<hr/> <hr/>

Explanation of Adjustments

(a) Loss claimed on the Antimony Ridge operation is decreased in the amount of \$2,500.00 to disallow construction of road for Idaho Power Company lines. It is held that the amount paid was in the nature of a capital expenditure and therefore unallowable.

Computation of Tax—1944

Declared Value Excess Profits Tax Computation

1. Net income for declared value excess profits tax computation.....		\$170,281.09
2. Less: 10% of \$2,500,000.00 value of capital stock as declared for year ended June 30, 1944.....	\$250,000.00	
Dividends received credit.....	None	250,000.00
3. Net income subject to declared value excess profits tax (carried forward)		None
5. Declared value excess profits tax due		None
6. Previously assessed		None
7. Deficiency/overassessment in declared value excess profits tax.....		None

Normal Tax Computation
(Alternative Method)

1. Net income	\$171,872.93								
2. Less: excess of net long-term capital gain over net short-term capital loss	1,591.84								
3. Adjusted net income	\$170,281.09								
6. Less: income subject to excess profits tax	137,185.35								
8. Normal tax net income	\$ 33,095.74								
<table> <tr> <td>\$ 5,000.00 @ 15%.....</td><td>\$ 750.00</td></tr> <tr> <td>15,000.00 @ 17%.....</td><td>2,550.00</td></tr> <tr> <td>5,000.00 @ 19%.....</td><td>950.00</td></tr> <tr> <td>8,095.74 @ 31%.....</td><td>2,509.68</td></tr> </table>		\$ 5,000.00 @ 15%.....	\$ 750.00	15,000.00 @ 17%.....	2,550.00	5,000.00 @ 19%.....	950.00	8,095.74 @ 31%.....	2,509.68
\$ 5,000.00 @ 15%.....	\$ 750.00								
15,000.00 @ 17%.....	2,550.00								
5,000.00 @ 19%.....	950.00								
8,095.74 @ 31%.....	2,509.68								
14. Total normal tax	\$ 6,759.68								

Surtax Computation

17. Adjusted net income	\$170,281.09
18. Less: income subject to excess profit tax	137,185.35
21. Adjusted surtax net income.....	<u>\$ 33,095.74</u>
\$25,000.00 @ 10%.....	\$ 2,500.00
8,095.74 @ 22%.....	1,781.06
	<u>\$ 4,281.06</u>
27. Partial tax (Line 14, plus Line 21)	\$ 11,040.74
28. 25% of Line 2.....	397.96
Total tax liability.....	<u>\$ 11,438.70</u>
Previously assessed:	
Account No. Apr. 410004—Idaho..	\$67,510.40
Account No. May 520600—Idaho..	999.99
	<u>68,510.39</u>
Overassessment in income tax	<u>(\$57,071.69)</u>

Taxable Year Ended December 31, 1944
Adjustment to Excess Profits Net Income

Excess profits net income disclosed by return (none filed)	None
Additional income and unallowable deductions:	
(a) Royalty income	\$190,243.19
(b) Antimony Ridge loss (decreased)	2,500.00
Total	<u>\$192,743.19</u>
Less: allowable deductions per return	22,462.10
Excess profits net income	<u>\$170,281.09</u>

Explanation of Adjustments

(a) In your income and declared value excess-profits tax returns, Form 1120, for the years 1944 and 1945, you reported

incomes and losses from the "Stibnite," "Bonanza" and "Antimony Ridge" properties as follows:

	1944	1945
Stibnite	\$219,439.42	\$74,247.37
Bonanza	(14,160.36)	(34,583.10)
Antimony Ridge	(15,035.87)	(8,499.26)
Total	<u>\$190,243.19</u>	<u>\$31,165.01</u>

You did not file a corporation excess profits tax return, Form 1121, for either of the years 1944 or 1945, and the sums shown above were not reported for excess profits tax purposes for either of such years.

It has been determined that you were not engaged in mining strategic minerals from the Stibnite property during either of the taxable years 1944 or 1945, within the meaning of Section 731 of the Internal Revenue Code of 1939, as amended; and that, therefore, the income realized by you from the Stibnite property during those years is not exempt from taxation under the provisions of Subchapter E of the Internal Revenue Code of 1939, as amended.

(b) Reference explanation of adjustment to income tax net income above.

Excess Profits Tax Computation—1944

1. Excess profits net income.....	\$170,281.09
2. Specific exemption	\$ 10,000.00
4. Excess profits credit based on invested capital	23,095.74
5. Total credit	<u>33,095.74</u>
8. Adjusted excess profits net income	<u>\$137,185.35</u>
9. 95% of adjusted excess profits net income	<u>\$130,326.08</u>
10. Net income	\$171,872.93
11. Less: Dividends received credit.....	<u>None</u>

Excess Profits Tax Computation—1944—(Cont.)

12. Surtax net income	\$171,872.93
13. 80% of item 12.....	137,498.34
14. Income tax under Chapter 1.....	11,438.70
	<hr/>
15. Excess of Line 13 over item 14.....	\$126,059.64
16. Item 9 or item 15, whichever is lesser	126,059.64
21. Less: Post War Credit (10% of item 16)	12,605.96
	<hr/>
24. Excess profit tax due	\$113,453.68
Previously assessed	None
	<hr/>
Deficiency in excess profits tax.....	\$113,453.68
	<hr/> <hr/>

Excess Profits Credits—Based on Invested Capital		1944	1945
Money or property paid in for stock—			
Par value of capital stock		\$500,000.00	\$500,000.00
Unissued capital stock	\$ 42,870.60		\$ 42,870.60
Discount on stock	158,803.70		158,803.70
Distribution not out of earnings of profits	9,628.90	211,303.20	317,592.40
Net money or property paid in for stock		\$288,696.80	\$182,407.60
Accumulated earnings & profits		None	None
Equity invested capital at beginning of taxable year.....		\$288,696.80	\$182,407.60
Adjustments		None	None
Invested capital		\$288,696.80	\$182,407.60
Excess profits credit—8% of invested capital.....		\$ 23,095.74	\$ 14,592.61

Taxable Year Ended December 31, 1945

Adjustments to Net Income

Net income disclosed by return.....	\$ 20,968.44
As adjusted	\$ 20,968.44
<hr/>	
Net adjustment	None

Explanation of Adjustments

No adjustment has been made to net income as shown by return filed.

Computation of Tax—1945

Declared Value Excess Profits Tax Computation

Net income subject to declared value excess profits tax (same as return)....	None
<hr/>	
Declared value excess profits tax due....	None
Previously assessed	None
<hr/>	
Deficiency/overassessment in declared value excess profits tax	None
<hr/>	

Normal Tax and Surtax Computation

Net income (same as return)	\$ 20,968.44
<hr/>	
Normal tax (same as return)	3,484.00
Surtax (same as return)	2,096.84
<hr/>	
Income tax liability (same as return)..	\$ 5,580.84
Previously assessed, Account No. Apr. 410002—Idaho	5,580.84
<hr/>	
Deficiency/overassessment in income tax	None
<hr/>	

Taxable Year Ended December 31, 1945

Adjustment to Excess Profits Net Income

Excess profits net income disclosed by return (none filed)		None
<hr/>		
Additional income and unallowable deductions:		
(a) Royalty income	\$ 31,165.01	
Less: Allowable deductions per return	10,196.57	\$ 20,968.44
	<hr/>	<hr/>
Excess profits net income.....		\$ 20,968.44
		<hr/> <hr/>

Taxable Year Ended December 31, 1945

Explanation of Adjustments

(a) Reference paragraph (a) of explanation of adjustments for excess profits net income for year 1944 above.

Excess Profits Tax Computation—1945

1. Excess profits net income.....		\$ 20,968.44
2. Specific exemption	\$ 10,000.00	
3. Excess profits credit based on in- vested capital	14,592.61	24,592.61
	<hr/>	<hr/>
8. Adjusted excess profits net income		None
<hr/>		
24. Excess profits tax due.....		None
Previously assessed		None
Deficiency/overassessment in excess profits tax		None
		<hr/> <hr/>

[Endorsed]: Filed April 25, 1955.

[Title of Tax Court and Cause.]

AMENDMENT TO PETITION

Now Comes the petitioner above named and submits by way of amendment to his Petition on file herein an additional verification as follows:

State of Idaho,
County of Ada—ss.

J. J. Oberbillig, being duly sworn, says that he is the president of United Mercury Mines Company, a Corporation, petitioner above named, and as such president he is duly authorized to verify the petition filed in the Tax Court of the United States with reference to the above-entitled action; that as such president of United Mercury Mines Company, a Corporation, he verified the original petition dated April 21, 1955, and is familiar with its contents and now again swears that they are true, except those stated to be upon information and belief, and that those he believes to be true.

/s/ J. J. OBERBILLIG.

Subscribed and sworn to before me this 3rd day of May, 1955.

[Seal] /s/ ROBERT T. MILLER,
Notary Public for Idaho.

[Endorsed]: Filed May 5, 1955.

[Title of Tax Court and Cause.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and for answer to the petition filed herein, admits, denies and alleges as follows:

1. Admits the allegations contained in the first sentence of paragraph I of the petition, as amended. Denies the remaining allegations contained in said paragraph. Alleges that petitioner did not file an excess profits tax return for the taxable year 1944; and further, that its corporation income and declared value excess-profits tax return for said taxable year was filed on April 18, 1945.

2. Admits the allegations contained in paragraph II of the petition, as amended.

3. Admits the allegations contained in paragraph III of the petition, as amended, except that it is denied that the overassessment of income tax for the taxable year 1944, as shown by the notice of deficiency, is in controversy in this proceeding.

4. Denies that he erred in his determination of the deficiency in excess profits tax as shown in the notice of deficiency from which petitioner's appeal is taken. Specifically denies that he erred in the manner and form as alleged in paragraph IV of the petition, as amended.

5. For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph V (a) to (h), inclusive, of the petition, as amended.

6. Denies generally and specifically each and every material allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissioner's determination of the deficiency be approved.

/s/ JOHN POTTS BARNES,
Chief Counsel, Internal Revenue Service, Counsel
for Respondent.

Of Counsel:

MELVIN L. SEARS,
Regional Counsel;

JOHN H. PIGG,
Attorney, Internal Revenue
Service.

[Endorsed]: Filed June 7, 1955.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties above named, appearing and acting by and through their respective counsel of record, as follows:

1. Petitioner is a corporation, organized January 20, 1921, under the laws of the State of Idaho. Its authorized capital is \$500,000, divided into five million shares of common stock at a par value of ten cents each. All of the stock is issued and outstanding. Petitioner has 475 stockholders, and its largest stockholder, its president and founder, J. J. Ober-

billig, owns slightly less than 10 per cent of the stock.

2. Under its Articles of Incorporation, petitioner is authorized generally to engage in the mining business, as follows:

To purchase, acquire, hold, own, sell, trade, lease, rent, locate and otherwise secure, handle and dispose of mines, mining properties, mining locations, ores, mineral deposits, timber and water rights;

To manage, develop, operate, work and equip mines, mining properties, lodes and deposits, and to mill, reduce, treat, and handle ores, and sell and dispose of produce derived from same;

To buy, acquire, own, sell, mortgage, and otherwise secure, handle, and dispose of such personal property and real estate, as the said corporation may deem necessary, desirable or expedient for its use in the transaction of its business;

To construct buildings and other structures, on real estate, owned, leased, located, or otherwise procured by said separation and otherwise the same;

To borrow money in the name of said corporation, to mortgage, pledge, or hypothecate in any manner, any or all of the property of said corporation, either real, personal, or mixed, to secure the payment of the same; and in general;

To conduct a general mining business, and to buy, own, manage, and operate mines and mining claims, and to do all things needful incident thereto.

3. Petitioner's federal tax returns for the years 1944 and 1945 were filed with the then Collector of

Internal Revenue for the District of Idaho. Petitioner filed no excess profits tax returns for 1944 and 1945. Attached hereto as Exhibits 1-A and 2-B are photostat copies of the corporation income and declared value excess-profits tax returns of the petitioner for the years 1944 and 1945.

4. At all times since its organization in 1921, petitioner has been engaged in the mining business in Idaho in an area known as the Yellow Pine Mining District, Valley County, Idaho. This district is approximately eighty miles from the nearest rail head at Cascade, Idaho. In general the mineral properties belonging to petitioner in 1941, some of which were subject to options dating back to 1927, involved approximately seven hundred mining claims comprising approximately 14,000 acres. These properties included the following:

(a) The Stibnite Property. This consisted primarily of two groups of mining claims, the first known as the Meadow Creek group, and the second known as the Hennessey group or East Fork group. The Hennessey group contained large deposits of Tungsten ore.

(b) The Midnight Group. This consisted of mining claims located near the Stibnite property.

(c) Smokey Ridge Group. This consisted of mining claims located near the Stibnite property.

(d) Antimony Ridge Group. This consisted of quicksilver, gold and antimony mining claims lying northwest of the Stibnite property.

(e) Cinnabar Group. This consisted of quick-

silver mining claims lying east of the Stibnite property.

Attached hereto as Exhibit 3-C is a sketch showing the relative location of the mining properties belonging to the petitioner in 1941.

5. On December 31, 1941, petitioner transferred its Stibnite properties to Bradley Mining Company pursuant to contract executed on that date. This contract, attached as Exhibit 4-D, was in force in the taxable year 1944. The nature and interpretation of the contract was involved in an opinion promulgated February 8, 1956, by the Court of Appeals for the Ninth Circuit, in the case of *United Mercury Mines Co. vs. Bradley Mining Co.* This opinion, copy of which is attached as Exhibit 5-E, is to be considered part of the record of this proceeding.

6. The contract executed December 31, 1941, related to the Stibnite properties described in paragraph 4(a) above, with a separate option therein covering the Midnight group described in paragraph 4(b) above. During 1944 and 1945, Bradley Mining Company, hereafter also referred to as "Bradley," operated the properties described in paragraph 4(a) above. Bradley built mine buildings, installed the power generating equipment, concentration plant, and other buildings. Bradley owned the equipment, machinery and other personal property located at the mine. Bradley operated and worked the Stibnite properties and extracted, transported, marketed, and sold the ore, and received the payments from

purchasers. At no time before or after the 1941 contract did petitioner ever engage in the removal of ore for sale from the Stibnite properties and the Midnight group described in paragraph 4(b) above.

7. Under the contract of December 31, 1941, an option was given to Bradley to acquire the Midnight group of mining claims. This option was exercised on October 8, 1943, and the claims transferred to Bradley.

8. Petitioner was engaged in mining the Cinnabar property for quicksilver in 1944 and 1945. In 1941 petitioner deeded a 55% interest in the Cinnabar to Bonanza Mines, Inc. The Cinnabar had not been worked prior to the transfer to Bonanza. Thereafter a reduction plant was built and the property operated as a joint venture by Bonanza and petitioner. The mining operations resulted in the following incomes and losses during the period from 1942 to 1945, inclusive:

Year	Income or (Loss)
1942	\$ 40,488.79
1943	89,325.50
1944	(14,160.36)
1945	(34,583.10)

9. Petitioner also worked the Antimony Ridge property for antimony in 1944 and 1945. This mining operation resulted in losses during the period from 1941 to 1944, inclusive, and in 1947 this property was transferred to Bradley. The gross incomes

and resulting losses from these operations were as follows:

Year	Gross Income From Sales	(Loss)
1941	\$27,403.84	(\$16,323.05)
1942	19,583.33	(32,651.92)
1943	2,800.00	(15,035.87)
1944	6,0000.00	(8,499.26)

10. All the exhibits herein mentioned shall be considered as having been offered and received in evidence in this case unless objection is made thereto and the objection is sustained.

11. Each of the parties hereto reserves the right to supplement the facts herein set forth with evidence at the trial, and particularly to amplify paragraph 6 above.

/s/ JOHN A. CARVER, JR.,

Counsel for Petitioner;

/s/ JOHN POTTS BARNES,

Chief Counsel, Internal Revenue Service, Counsel
for Respondent.

[Endorsed]: Filed May 2, 1956.

[Title of Tax Court and Cause.]

MEMORANDUM FINDINGS OF FACT AND OPINION

This proceeding involves a deficiency in excess profits tax of petitioner for the year 1944 in the amount of \$113,453.68.

The sole issue presented is whether petitioner is

exempt from excess profits tax on income it received in 1944 under a "Conveyance, Royalty Agreement, and Option," dated December 31, 1941, by virtue of the provisions of section 731 of the Internal Revenue Code of 1939.

Findings of Fact

The stipulated facts are found accordingly.

Petitioner is an Idaho corporation organized in 1921. Its authorized capital is \$500,000, consisting of five million shares of the par value of 10 cents per share, all of which is issued and outstanding.

Petitioner filed its federal income and declared value excess profits tax return for the year 1944 with the collector of internal revenue for the district of Idaho. It did not file an excess profits tax return for that year.

By its charter petitioner is authorized generally to engage in the mining business, to acquire, hold, manage, develop, operate, and work mining properties, together with the usual incidental powers.

Since its incorporation petitioner has been so engaged in an area known as the Yellow Pine Mining District, Valley County, Idaho.

In general, the mineral properties belonging to petitioner in 1941 consisted of approximately 700 mining claims covering about 14,000 acres. These properties may be designated as follows:

1. The Stibnite Property. This consisted primarily of two groups of mining claims, the first known as the Meadow Creek group, and the second known as the Hennessy group or East Fork group.

The Hennessy group contained large deposits of Tungsten ore.

2. The Midnight Group. This consisted of mining claims located near the Stibnite property.

3. Smokey Ridge Group. This consisted of mining claims located near the Stibnite property.

4. Antimony Ridge Group. This consisted of quicksilver, gold and antimony mining claims lying northwest of the Stibnite property.

5. Cinnabar Group. This consisted of quicksilver mining claims lying east of the Stibnite property.

The Bradley Mining Company, hereinafter referred to as Bradley, was organized under the laws of California for the purpose of engaging in the mining business. Bradley was a large operating concern with considerable working capital.

On August 5, 1927, petitioner negotiated an option agreement with Bradley for the development and operation of the Meadow Creek and Cinnabar claims. The agreement also granted Bradley an option to purchase petitioner's title in the mining claims for \$1,500,000. In the meantime petitioner was to receive certain royalty payments which were to be credited toward the purchase price. The agreement of August 5, 1927, did not extend to the Hennessy mining claims which were purchased outright by Bradley in 1927. After spending approximately \$30,000 on the Hennessy claims, Bradley abandoned them. Petitioner reacquired the Hennessy claims

and they were included, along with the Meadow Creek claims, in subsequent agreements executed between Bradley and petitioner in 1930 and 1939. These two groups of claims comprised the Stibnite mining properties heretofore mentioned. The acquisition of the Hennessy claims was described in the option agreement dated May 16, 1939, as follows:

And Whereas, subsequent to said agreement on October 3, 1930, the Yellow Pine Company and its successor in interest, the Bradley Mining Co., acquired a group of mining claims known as the Hennessy Group, [sic] which said group of claims was acquired with the understanding and agreement that it would become a part of the Meadow Creek Group of lode mining claims and to be owned by the United Mercury Mines Company until the acquisition of the entire Meadow Creek Group by the Yellow Pine Company;

* * *

On September 4, 1939, Bradley and petitioner executed a "Form of Agreement for Mineral Explorations" granting to the Government the right to enter upon the Stibnite property for the purpose of prospecting, drilling, and exploring for minerals. The exploratory operations were not commenced until the summer of 1941. The drilling was at Government expense and under the supervision of the Bureau of Mines, and resulted in the discovery of tungsten.

The contractual relationship which had existed

between Bradley and petitioner from 1927 to 1941 was terminated on December 31, 1941, and on the same date a new agreement designated "Conveyance, Royalty Agreement, and Option," was executed. That agreement provides in part as follows:

That the said United [petitioner] for and in consideration of the royalty hereinafter agreed to be paid by Bradley * * * has Granted, Bargained, Sold, and Assigned, and does by these presents grant, bargain, sell and assign, unto Bradley * * * all of the following described lode and placer mining claims situate in the Yellow Pine Mining District, Valley County, State of Idaho, consisting of two groups of lode mining claims, the first of said groups being commonly known as the Meadow Creek Group, and the second of said groups being commonly known as the Hennessy Group * * *.

Together with the personal property situate upon said mining claims;

Together with all millsites, power plants, transmission lines, dams, reservoirs, mills, dwellings, buildings, structures, water rights, tail races, tailing sites, tailing dams or easements * * * To Have and to Hold, subject to the royalty herein reserved and retained by United, all and singular the said premises, together with the appurtenances and privileges thereunto incident, unto the said Bradley, its successors and assigns, forever.

* * *

For and in consideration of the premises * * * Bradley * * * does hereby covenant, promise and

agree to pay to United * * * a royalty of five per cent (5% on all net smelter returns, net revenue, and net mint returns, as defined herein * * *; the payment of said five per cent (5%) royalty to begin with the first returns received on concentrates shipped from Cascade, Idaho, after Midnight, December 31, 1941, and to continue thereafter for nine hundred and ninety-nine (999) years and as long thereafter as minerals, ores or values shall be extracted, mined or taken from the above-described property * * *.

* * *

It is agreed that the time, amount, extent and manner of conducting mining operations and development work upon or in the above-described mining claims shall be in the sole discretion of Bradley * * * and that the failure of Bradley to mine shall not be held to be a condition subsequent defeating the conveyance made hereby.

Anything in this agreement contained to the contrary notwithstanding, it is the intention of the parties to this agreement that the full ownership, possession and control of all the properties above described,* * * and all of the personal property acquired and/or used on or in connection with the operation and development of the above-described properties, shall be vested in Bradley, and the United shall have no interest in fee in or to said properties, or in and to any of the personal property acquired and/or used in connection with the operation and development of said properties; * * *.

After 1941 the operations conducted by Bradley were primarily directed toward the development

and mining of tungsten from the Hennessy mine. Between 1927 and 1933 Bradley expended in excess of \$100,000 per year in development of the properties under the option agreements.

The option agreement dated May 16, 1939, provided in part as follows:

And Whereas, the party of the second party [Bradley] went into actual possession of said properties and began bona fide development work thereon upon the signing of and in accordance with the provisions of said option agreement dated August 5th, 1927, and has during each and every year thereafter expended in developing and equipping in, upon, and/or for the benefit of said properties a sum of not less than twenty-four thousand dollars (\$24,000.00);

* * *

Bradley erected mine buildings, a concentration plant, and other buildings, and installed the power generating equipment. It owned the equipment, machinery, and other personal property located at the mine. Bradley operated the Stibnite properties. It extracted, transported, marketed and sold the ore and received the payments from purchasers. At no time before or after the 1941 contract did petitioner engage in the removal of ore for sale from the Stibnite and Midnight group of properties.

The relationship between petitioner and Bradley was not always harmonious. Differences frequently arose with respect to provisions of the agreements which were amicably adjusted. However, sometime

subsequent to the taxable year petitioner instituted a suit against Bradley which involved an issue with respect to royalty computations. *United Mercury Mines vs. Bradley Mining Co.*, 233 F. 2d 205 (C.A.9).

Petitioner was engaged in mining the Cinnabar property for quicksilver in 1944 and 1945. In 1941 petitioner deeded a 55 per cent interest in the Cinnabar property to Bonanza Mines, Inc. The Cinnabar property had not been worked prior to the transfer. Thereafter a reduction plant was built and the property was operated as a joint venture by petitioner and Bonanza.

Petitioner also worked the Antimony Ridge property for antimony in 1944 and 1945. This mining operation resulted in losses during the period 1941 to 1944, inclusive. In 1947 the Antimony Ridge property was transferred to Bradley.

In its income and declared value excess profits tax return for 1944 petitioner reported the following:

Royalty income under contract

dated December 31, 1941...\$219,439.42

Income from operation of An-

timony Ridge Mine..... (14,160.36) Loss

Income from operation of Bo-

nanza mine..... (15,035.87) Loss

Total income reported...\$190,243.19

In his deficiency notice the respondent determined that petitioner was not engaged in mining strategic minerals from the Stibnite property during the year 1944 within the meaning of section 731 of the In-

ternal Revenue Code of 1939, and the income realized from the Stibnite property during 1944 is not exempt from taxation under the provisions of Subchapter E of the Internal Revenue Code of 1939, as amended.

Petitioner was not engaged in the mining of tungsten during the taxable year 1944 within the purview of section 731 of the Internal Revenue Code of 1939.

Opinion

LeMire, Judge:

The question presented is whether petitioner was engaged in the mining of tungsten within the meaning of section 731 of the Internal Revenue Code of 1931¹ during the taxable year 1944, so that its adjusted excess profits net income was exempt from the excess profits tax. The respondent determined that petitioner was not so engaged. Petitioner filed no excess profits tax return for that year. The respondent determined that petitioner was not exempt from excess profits tax, and included the royalty income received by petitioner from Bradley Mining

¹Sec. 731. Corporations Engaged in Mining of Strategic Minerals.

In the case of any domestic corporation engaged in the mining of * * * tungsten * * * the portion of the adjusted excess profits net income attributable to such mining in the United States shall be exempt from the tax imposed by this sub-chapter. The tax on the remaining portion of such adjusted excess profits net income shall be an amount which bears the same ratio to the tax computed without regard to this section as such remaining portion bears to the entire adjusted excess profits net income.

Company, which owned and operated the Hennessy property from which the tungsten was extracted, in determining petitioner's adjusted excess profits net income. The amounts involved are not in controversy.

Section 731 of the 1939 Code, as amended, was construed in *Oregon Chrome Mines, Inc.*, 15 T. C. 389, affd. 192 F. 2d 783 (C.A. 9), wherein the purpose and legislative history of the provisions was reviewed. We think it unnecessary to reiterate what has there been stated.

In the instant proceeding, as in the *Oregon* case, *supra*, the question presented involves an interpretation of the phrase "engaged in mining" within the meaning of section 731 of the Code. In the *Oregon* case the word "mining" was construed to refer to the extraction of ore from the earth. It was there held that a lessee of a mine receiving royalty income from the lessor which extracted the strategic mineral was not entitled to exemption from excess profits tax under section 731.

In the taxable year 1944 petitioner received royalty income pursuant to the agreement dated December 31, 1941, with Bradley. The Hennessy property which produced the tungsten was owned and operated by Bradley. It owned the buildings and equipment and extracted the ore. Bradley also received the sales price upon which the royalty income in controversy was computed.

The respondent relies solely upon the *Oregon* case, *supra*, as authority here. After a careful re-

view of the entire record we are convinced that the instant case presents no material and controlling facts that would prevent the application of the rationale of the Oregon case, *supra*.

Petitioner, on brief, concedes that it did not extract minerals from the Stibnite properties during the taxable year involved. It states that a "slavish application of the literal language of the Ninth Circuit opinion in Oregon Chrome might foreclose the relief sought" and it urges a reconsideration and a broadening of the scope of the meaning of the phrase "engaged in mining," as used in section 731. This we decline to do. We are of the opinion that the Oregon case, *supra*, was correctly decided and that it is a controlling authority. Any appeal taken herein will go to the same Court of Appeals which affirmed our decision in the Oregon case, *supra*.

We therefore hold that the royalty income received by petitioner in the taxable year 1944 with respect to tungsten extracted from the Stibnite property was not exempt from excess profits tax under section 731 of the Internal Revenue Code of 1939. The respondent's determination is sustained.

Decision will be entered for the respondent.

Served December 26, 1956.

Filed and entered December 26, 1956.

The Tax Court of the United States
Docket No. 57500

UNITED MERCURY MINES COMPANY, a
Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, filed December 26, 1956, it is Ordered and Decided: That there is a deficiency in excess profits tax for the year 1944 in the amount of \$113,453.68.

/s/ C. P. LeMIRE,
Judge.

Served December 28, 1956.

Filed and entered December 26, 1956.

United States Court of Appeals
for the Ninth Circuit
Docket No. 57500

UNITED MERCURY MINES COMPANY, a Cor-
poration,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW

To the Clerk of the Tax Court of the United States:

Pursuant to the provisions of Rule 29 of the Rules of the United States Court of Appeals for the Ninth Circuit, notice is hereby given that the petitioner above named petitions the United States Court of Appeals for the Ninth Circuit for review of that certain order and decision of the Tax Court of the United States rendered and issued on the 26th day of December, 1956, Tax Court Docket No. 57500.

The controversy in this cause is the liability of the petitioner for excess profits tax for the calendar year 1944. By its order on the above date, the Tax Court of the United States determined a liability of the petitioner in the sum of \$113,453.68. It was and is the contention of the petitioner that it was exempt from such tax under and by virtue of the provisions of the statute then in effect, to wit, Section 731, Internal Revenue Code, for the reason that the petitioner was engaged in mining within the meaning of that section. Such contention was determined by the Tax Court adversely to petitioner.

Venue lies in the United States Court of Appeals for the Ninth Circuit for the reason that tax returns for the year in question were filed by the petitioner with the Collector of Internal Revenue for the District of Idaho.

Dated this 18th day of March, 1957.

JOHN A. CARVER, JR.,

DALE CLEMONS,

Attorneys for Petitioner.

Certificate of service attached.

Filed March 22, 1957, T.C.U.S.

[Title of Court Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Pursuant to Rule 75 of the Federal Rules of Civil Procedure, the petitioner hereby designates the entire record, including pleadings, exhibits and testimony, to constitute the transcript of record on review in the above-entitled case.

/s/ JOHN A. CARVER, JR.,

/s/ DALE CLEMONS,

Attorneys for Petitioner.

Certificate of service attached.

Filed April 9, 1957, T.C.U.S.

In the Tax Court of the United States
Docket No. 57500

UNITED MERCURY MINES COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Monday, April 30, 1956

The above-entitled matter came on for hearing,

pursuant to notice to the parties, at 10:37 o'clock a.m.

Before: Honorable Clarence P. LeMire, Judge,
Presiding.

Appearances:

MR. JOHN D. PICCO,
Bureau of Internal Revenue,
For the Respondent.

MR. JOHN A. CARVER, JR.,
For the Petitioner.

PROCEEDINGS

The Clerk: Docket Number 57500, United Mercury Mines Company.

Mr. Picco: John D. Picco, for the Respondent. This is a trial case, your Honor. John A. Carver, Jr., is the attorney for Petitioner. He is from Boise, Idaho. I saw him about a week ago and he told me at that time he wouldn't be able to make it today under any circumstances. He had some business down in San Francisco. He has since written me a letter and asked that the case be set, if at all possible, for Wednesday, Thursday or Friday of this week—any day.

The Court: Any time after Tuesday?

Mr. Picco: That's right. He tells me that it would be anywhere from three to five hours. He will only have one witness, but this witness apparently is rather a slow type of an individual and it will probably take five hours, if I gauge it correctly.

The Court: He thought it would take about one day to hear the case?

Mr. Picco: Yes.

The Court: Does the Government have any testimony?

Mr. Picco: No; no, the Government does not.

The Court: I will mark that one day.

Mr. Picco: I will phone him as soon as I find out when you set the case, your Honor.

The Court: Very well. [3*]

(Whereupon, at 10:40 o'clock a.m., the calendar call in this matter was concluded. The matter was subsequently set for hearing on May 2, 1956, and at 10:00 o'clock a.m. the hearing was called with the parties heretofore mentioned being present.)

The Clerk: I will call Docket 57500, United Mercury Mines Company.

Will counsel please state their appearances?

Mr. Picco: John D. Picco, for the Respondent.

Mr. Carver: John A. Carver, Jr., for the Petitioner.

The Court: Very well, gentlemen, you may proceed with your statements.

Mr. Carver: If the Court please, at this time, prior to making a statement, I would like leave, under Rule Twenty-five, to have recognized Mr. Dale Clemons of Boise, Idaho, a member of the bar of the Supreme Court of Idaho and the Ninth Circuit Court of Appeals. He has filed heretofore, on April 16th, an application for enrollment.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: It hasn't been acted on yet?

Mr. Carver: He has not received the certificate.

The Court: Very well.

Mr. Carver: May it please the Court——

The Clerk: Will you give me an appearance form before you leave the courtroom, please, Mr. Clemons?

Mr. Carver: May it please the Court, in this case, the issue is whether the Petitioner Corporation's adjusted excess profits [4] net income for the year 1944 was exempt from excess profits' tax by virtue of Section Seven Thirty-one of the Code, then in effect. This is the issue which was presented in Oregon Chrome Mines, Fifteen Tax Court, Three Eighty-nine, wherein the Court—Tax Court—divided five to four—majority opinion being affirmed by the United States Court of Appeals, One Ninety-two, Federal Second, Seven Eighty-three.

The Petitioner will show that the facts in the instant case are entirely different from those in Oregon Chrome; that, therefore, Oregon Chrome is not authority for the Commissioner's determination of deficiency. The Petitioner and Respondent have executed a stipulation which will be filed concerning the corporate status and structure of the Petitioner—concerning its chartered authority, filing of its corporate income tax returns, and that no excess profits tax returns were filed; that the Petitioner, since its organization in 1921, has been engaged in the mining business in Idaho and owns certain mineral properties, some of which yielded the values resulting in the income in question for the year

1944. Some of the claims, including those yielding the values here in controversy, were, during 1944, subject to the contract—the subject of a contract to Bradley Mining Company, dated December 31, 1941. We stipulated that the meaning of such contract has been litigated to the Ninth Circuit, United States Court of Appeals, and that under such contract, Bradley Mining Company operated and worked the properties and marketed and sold the ore and paid Petitioners sums called for in the contract—this was the source of [5] the income in question.

It was also stipulated that the Petitioner was engaged in actual mining of—in mining properties in the same general area for quicksilver in the years in question, and also for antimony—being adjoining properties.

In addition to the stipulated facts, the Petitioner is prepared to prove and will prove that the revenue in question was derived from mining a strategic mineral, tungsten; that the Petitioner Corporation not only acquired the properties many years ago and continuously performed prospecting and development work upon the properties, but, likewise, has been instrumental in the over-all mining operation, including activities performed both before and after the contract with the Bradley Mining Company, December 31, 1941. These activities included: Securing the performance of exploration work by the United States Government to block out the tungsten ore which yielded the values in question; assistance in road construction, for the purpose of

procuring electrical transmission lines to the property; and general developmental work upon the properties for the benefit of the enterprise outside and beyond the contract with the Bradley Mining Company.

In addition, the Petitioner will prove that during the years in question it contributed to the success of the enterprise by bearing a portion of the cost, construction of a treatment plant, built by Bradley Mining Company, to improve the quality of the ore after mining for shipment to the smelter, and by bearing a disproportionate [6] share of the cost of the transportation of some of the ore. Petitioner will show a capital commitment in the properties by 1944 in excess of four hundred thousand dollars.

Petitioner will show participation in the mining activities with reference to the instant properties which establish its qualification for the exemption provided in Section Seven Thirty-one, of the excess profits tax.

The Court: Very well.

Mr. Picco: Respondent asks leave to file the stipulation of facts, your Honor. It has been agreed to by both parties.

The Court: And what are the exhibits attached?

Mr. Picco: The exhibits are five—Exhibit 1A—they are all joint—1A to 5E, inclusive.

The Court: Very well. The stipulation with Exhibits 1A through 5E is received in evidence.

Mr. Picco: If your Honor please, the Petitioner here is claiming the benefits of Section Seven Hundred and Thirty-one, on the ground that it was en-

gaged in mining tungsten on the Stibnite properties in 1944. We have an Exhibit 3C, which is a map, showing the relative locations of the various mining claims in the Yellow Pine Mining District, Valley County, Idaho; and this is an extra—in fact, it is the copy from which the photostats have been made, and I think the Judge might like to see this as it goes along.

The Court: Very well.

(Map handed to the Court.)

Mr. Picco: We are interested [7] primarily in this section here, Stibnite.

The Court: Very well.

Mr. Picco: If your Honor please, the Statute, as you know, grants an exemption from excess profits tax to a corporation engaged in mining strategic minerals. The Tax Court in Oregon Chrome Mines, as Petitioner's counsel has mentioned, held that a lessor of a chrome mine was not entitled, or did not qualify as a beneficiary under the Statute. The word "mining" was defined as an operation involving the extraction of ore or the treating of ore. This decision was affirmed by the Ninth Circuit, at which time that Court limited the word "mining" to the extraction of ore. Now, the Petitioner herein, was the owner of the Stibnite Mining Claims back in the twenties, and from 1927 to 1941—during that period of time, it leased or optioned these properties or claims, to Bradley Mining Company, which will probably be referred to many times by the name "Bradley."

Now, on December 31, 1941, the Petitioner sold the Stibnite Mine to Bradley, pursuant to this agreement—conveyance instrument attached to the stipulation, Exhibit 4D. So, your Honor, in the years 1944 and 1945, Bradley owned, operated and worked the Stibnite properties. That has been stipulated, in effect, if not literally. The Petitioner is contending, as I understand it, that it developed the Stibnite properties. I think perhaps Respondent will be able to show that Bradley did more in that connection than United Mercury, the Petitioner. Petitioner received five per cent of the net receipts from [8] the operations of that property in 1944.

In addition—I will have to add this—that the Petitioner did own and operate some other tracts that are on that map—the Antimony Ridge Mine and they also operated the Cinnabar Claims, jointly with Bonanza—that is another firm. These particular operations, however, were conducted, so far as I can see, on a very limited scale, and resulted in losses in the years in question.

Respondent's position, therefore, is that the Petitioner did not engage in mining tungsten from the Stibnite Mines in 1944, and Respondent submits that the case is controlled by Oregon Chrome and urges that the Respondent's determination be sustained.

The Court: Anything further, Mr. Carver?

Mr. Carver: Nothing further, your Honor.

The Court: Very well, you may call your first witness.

Mr. Carver: We will call Mr. J. J. Oberbillig.

J. J. OBERBILLIG

a witness called by and on behalf of the Petitioner, first having been duly sworn, was examined and testified as follows:

The Clerk: Please state your name and your address for the record.

Mr. Carver: State your name and address for the record, Mr. Oberbillig.

The Witness: J. J. Oberbillig.

The Clerk: J. J.—please spell your last name.

The Witness: O-b-e-r-b-i double l-i-g. My address [9] is Box 448, Boise, Idaho.

Direct Examination

By Mr. Carver:

Q. Mr. Oberbillig, what is your occupation?

A. I have been in the mining business ever since—in actual mining business ever since 1902.

Q. What is your present connection with the Petitioner Corporation, United Mercury Mines?

A. President ever since 1921.

Q. And that was the year it was incorporated, is that correct?

A. The year it was incorporated.

Q. Now, you stated that you have been in the mining business since 1902—would you state your qualifications and experience in the various aspects of the mining business beginning with your training and experience in locating and prospecting mining claims?

(Testimony of J. J. Oberbillig.)

A. I have had an extensive experience along those lines. I have perhaps located at least eight hundred mining claims in my time, and perhaps purchased outright at least four hundred.

Q. Would you speak up just a little louder?

A. What?

Q. Would you speak a little louder if you could, Mr. Oberbillig?

A. Yes, I will. I have a hard time hearing, too.

Mr. Picco: That is all right, Mr. Oberbillig. I want [10] the Judge to hear what you have to say.

Q. Now, have you located and prospected claims yourself, personally?

A. Repeat that, will you?

Q. Have you located and prospected claims personally—had personal experience in the actual prospecting of mining claims?

A. Yes; I have in a considerable number of them, whenever I found a claim that had sufficient showings on it to justify the location. I always located it, especially in the Yellow Pine Mining District in Valley County, where these operations are going on now.

Q. Now, would you state your training and experience in the development of mines?

A. Well, I have had considerable experience in the development of mines and especially with good luck and was very fortunate in having these developments prove up ore, especially to that end wherever my work was directed. At Meadow Creek, which is part of this Bradley property that we sold

(Testimony of J. J. Oberbillig.)

to him, we opened up—I recommended to Bradley at the time of the purchase, that there was a million and a half in sight at that time. And when this mine was put into operation by Mr. Bradley it produced a million, seven hundred and eighty-six thousand dollars. Now, those are the figures, about, as I understand them.

The Court: Just a minute. Mr. Reporter, are you getting all that?

The Reporter: Yes, your Honor. [11]

The Court: The Court can't understand it. I want to be sure that the record is clear on it so that I will have the record before me.

Mr. Picco: I didn't get the year that he was talking about on this. I don't know whether he mentioned it or not.

Q. Would you speak up now, Mr. Oberbillig—direct it to the Court, so that he can hear you, and would you repeat for the Court and counsel the experience you have had in the development of mines? I am looking for your training and qualifications in developing mines.

A. I have developed mines in the Sea Foam (phonetic) District, the Blank Hornet District, the Yellow Jack District and numerous other districts in Idaho before I even went into the Yellow Pine Section. Is that better? Can you hear me?

Q. And what does the development—what does that work consist of, generally—just speaking generally?

A. Generally in tunnelling, cross-cutting and raises and in some instances sinking.

(Testimony of J. J. Oberbillig.)

Q. Now, have you had any experience, training, in the operation of mines? Have you been engaged in that work during this period of fifty-five years you mentioned?

A. Yes, yes; I have had a considerable experience, especially with the Bradley Mining Company.

Q. What mines have you operated?

A. I have operated the Cinnabar Mine, that is the Hermes [12] Group—quicksilver property, for nearly five years. I purchased that mine, or the interest, rather, from the Bonanza Mines Company in '49, and I carried on the developments there with a broken-down mine. I had everything to improve there. The works was caved in.

Q. Now, Mr. Oberbillig, during this period of time that you have been in the mining business, have you had experience and training in treatment, refining and other metallurgical aspects of mining?

A. Well, I first started out when I—when I first started out mining I was a professional assayer and I had a considerable knowledge of chemistry, and, of course, all those things are of a great help when you are operating a mine, because you can do your own assaying, do your own metallurgical work, and carry on your proposition on ores that would eventually become commercial.

Q. When did you first become interested in the mineral possibilities in the Yellow Pine Mining District in Idaho, Mr. Oberbillig?

A. In 1916.

Q. Now, what was the nature of your activities

(Testimony of J. J. Oberbillig.)

in connection with this interest, beginning with the time of your earliest visit to the properties?

A. When I first went in there, I went in to examine the Hermes Group, which was owned by Pringle Smith (phonetic). That was in July or August of 1916, and I was very elated over that property, because ores just stuck out—large croppings—quicksilver [13] ore, but the property was so isolated that it was very nearly prohibitive for anyone to undertake to try to operate that property and operate especially commercially, because there wasn't any roads in the country, or anything like that, see? The only conveyance we had in there—only transportation was by pack horse and pack string.

Q. What did you do in there, beginning in 1916?

A. I just made the examination and then I covered the—a large portion of the district. I have had a great deal of experience in geology and I travel over that district and I outlined several valuable ore structures that perhaps could be put into commercial use.

Q. Now, would you state just in a general way, Mr. Oberbillig, how the seven hundred claims referred to in the stipulation were assembled into the Petitioner Corporation?

A. The gathering in of those seven hundred claims run over a considerable period of time. In many places, where there was a good showing of ore, I purchased those claims, and at a very nominal figure. I would like to go back to '17—1917. That

(Testimony of J. J. Oberbillig.)

is the year—the summer when the United States declared war against Germany, in April, and then word was sent out for miners to get active and look up certain minerals. Well, I knew the quicksilver was there, so I went into the quicksilver field; and during that summer—during the summer of 1918, the Country was visited by several eminent geologists from Washington, and also from the Bureau of Mines of [14] Idaho and the University of Idaho, in the Geological Department, and then, of course, it meant to get active, because the Government was demanding some strategic minerals from that ore. And that fall, in 1918, the Armistice was signed and we were all there, holding property with the hope, you know, that we might get along a little further and get money to build roads in there and to get the material out economically. So, pretty near everybody in the country started to pull out—I stayed with the country and, of course, it meant a lot to me to stay with the country because I had an opportunity to purchase a lot of that property at practically my own price, and when I would purchase a group of claims—now, I am coming back to that—when I purchase a group of claims, I would protect them by making other locations along the ore structures and the outline of the ore zone, and so I kept that up until about '31—1931, and I built the property up, you might say, for Mr. Bradley at that time.

Q. Now, going back to the years immediately following incorporation, what was the nature of

(Testimony of J. J. Oberbillig.)

your developmental work on the properties referred to in the stipulation as the Cinnabar properties?

A. Well, on the Cinnabar property, you see, I—there is another company got in there ahead of me and that was called the Monumental Mercury Mines Company and, of course, when the war was over with, they gave up hope. Now, this Company bought that property for fifty thousand dollars. They paid five thousand dollars on it, and, well, in fact, they run out of money, so in July of 1920, I purchased that property from Mr. Smith (phonetic), who had still— [15] had the title to it, you know, and if the Monumental Mercury didn't pay the five thousand dollars due in that month, the property would revert back to him, so he came to me and he said that he would sell me that property. I told him that I would take the property on the basis of thirty-five thousand and pay him in six months. Now, I said, "That is an incentive to you," I says, "to make that deal to me." And he says, "Well, I will take you up with it." So they had sold eighty thousand shares of stock, and at that time I planned, you know, with the stockholders of that Company—at least, I met with them, you know, and they says, "Well, are you going to rob us out of our holdings?" I says, "No." I says, "I am going to give you stock—what you paid for, because I had the benefit of your work there—you develop." That was about eighty thousand shares. And I paid Monumental Mining Company approximately ten thousand—ten thousand dollars for this—

(Testimony of J. J. Oberbillig.)

Mr. Picco: Your Honor, I want to object to—Respondent doesn't mind giving some leeway here to just what developed back there, but it is difficult to follow as to whether he is talking about the property that we are interested in, and I think it is somewhat material. At the same time, I don't want to curb that too much, because the Oregon Chrome case has—the Court did mention in there about development, but I think we are getting a little off the beaten track.

The Court: Well, I can't see what bearing it has, but I am going to hear the testimony, Mr. Picco, for whatever it may be [16] worth.

Q. Perhaps, Mr. Oberbillig, now, what I would like you to tell the Court at this time, is what you did—what the Petitioner Corporation did after it was formed by way of blocking out and developing on the Cinnabar property.

A. Well, I took the property over——

Q. Beginning in 1921?

A. I took the property over in 1921.

Q. By that, you mean the Corporation did?

A. The Corporation took it over, and I immediately started the work of development and building camps for that property, and then I built some of the property down—I built trails around, down Cinnabar Creek, down Sugar Creek, up the East Fork to Meadow Creek, so that I would have a later season, you know, to deliver supplies.

Q. Now, did you have crews in there working at that time?

(Testimony of J. J. Oberbillig.)

A. I had three crews at that time working.

Q. What did they do?

A. They were developing—they were getting in the winter supplies—now, that means the wood and timber, you see, for mining—to carry on mining throughout the winter.

Mr. Picco: John, what year was this?

Q. Now, this was approximately—this was soon after 1921 we are speaking of, is that correct?

A. That is the winter of '21, '22 and so on. [17]

Q. In the years immediately following incorporation—now, you said you had crews in there. What did those crews do, did they open up tunnels?

A. In the first place, they got out their timber for the winter use, see, and the wood, and then we went to work and we were developing, you see. That is where I developed the Meadow Creek Mine, and put—well, I had a million and seven hundred thousand dollars blocked there.

Q. When was that blocked out?

A. That, I had that blocked out by 19—1923.

Q. 1923?

A. I had that blocked out by that time.

Q. What did you have blocked out on the Cinnabar by 1923?

A. Over a million pounds of mercury, and that was actually blocked, because I had run an intermediate from my lower works—had that ore proven right to a T.

Q. That development work on Cinnabar then, had the ore actually blocked out in '23?

(Testimony of J. J. Oberbillig.)

A. Yes.

Q. Now, I believe you have mentioned—I would like to ask you further concerning it—what work did you do on the Meadow Creek properties, to block out the ore in the early '20's?

A. That is where I had developed a million and a half dollars, according to my figures.

Q. On the Meadow Creek? [18]

A. On Meadow Creek.

Q. And that is a part of what is now referred to as the Stibnite properties in the stipulation, is that correct?

A. Yes; Meadow Creek is part of it, but the Meadow Creek has been shut down ever since 1937.

Q. Now, in connection with this development work—were there shafts run—dug and tunnels run, and so on?

A. There were just tunnels, cross-cuts and raises on the Meadow Creek when I turned the property over to Mr. Bradley.

Q. Now, what other development work—was there trenching?

A. Well, that is all surface work, you know, where we done our prospecting along the strike of the zone.

Q. You did that work with crews at that time?

A. Yes.

Q. Did you——

A. I named that ore structure the Meadow Creek Fault Zone, see? It was a large body of ore.

Q. Now, this work was done by the Petitioner

(Testimony of J. J. Oberbillig.)

Corporation, United Mercury? A. Yes, sir.

Q. Did you, personally, supervise it?

A. Oh, yes; I personally supervised that.

Q. Did you go in there on the property?

A. Yes; there is some winters I would make six trips in there on snowshoes, every month, to pay the men. [19]

Mr. Picco: What years are we talking about?

Q. Now, this is again speaking of the early years of incorporation, '21, '2, '3 and '4, is that correct?

A. Yes, sir.

Mr. Picco: This may seem a little unusual. I should maybe take it up on cross-examination, but I want the Judge to see the whole picture. When you are talking about "blocking out ores," are we talking about tungsten when we do that, or what are we talking about?

Mr. Carver: Well, I will ask the witness——

Mr. Picco: I wish you would bring that out now, if you will.

Q. Now, you blocked out, you mentioned quick-silver on the Cinnabar. What did you block out on Meadow Creek? What ore was that million and a half you referred to?

A. Well, now, he refers to tungsten there, that——

Q. Well, just——

A. ——would take me to the——

Q. Just answer—we are talking about the early '20's, now; what ore was that?

A. That was gold and antimony.

(Testimony of J. J. Oberbillig.)

Q. That's fine. Now, would you describe, briefly, the metallurgical problems which existed in connection with the ores which were disclosed in these early years?

A. Well, the Meadow Creek ores and especially all gold-antimony [20] ores of that vicinity—that is, the Yellow Pine Mining District—consisted of one of the most difficult metallurgical problems ever known in ore in the history of ore treatment. Now, there is no question about that, because I worked on that ore, and the best that I could recover was thirty per cent; and, of course, Mr. Fred—F. W. Bradley, he wouldn't stand back against anything—when I wrote him the letter—it was just a handwritten letter, he says, “Of course I am interested,” and I explained everything to him, and he come in then, in '27 and took that property over. That is what held us up, you know, was the metallurgical problems.

Q. Now, during the early 1920's, Mr. Oberbillig, did the Petitioner Corporation enter into any negotiations for sale, lease or other contractual disposition of the properties? Were you trying to get operating companies in there interested in them?

A. I interested the Homestake Mining Company, and they sent in their chief geologist in 1924 and he was very elated over the entire set-up. So, I told him, I says, “You had better wait until you get your samples back to Lead, South Dakota.” And, I says, “We talk about”—“Oh, no,” he says, “you come on right along, we'll make the deal.” Right

(Testimony of J. J. Oberbillig.)

away, they were going to pay a million dollars cash at that time. They had the money. So, when they worked on the ore, the metallurgist bluffed and they couldn't cut it. He claimed they were covered thirty-five per cent.

Q. Now, would you——

A. The property was then—they gave up the property. They [21] tried for a year on it.

Q. Now, turn, if you would, and address your replies to the Court, so that he can hear you clearly. When was the first time that the Bradley interest came in and became interested in these properties?

A. In May of 1927.

Q. Now, who came at that time?

A. His experts—his engineers.

Q. Who was Fred W. Bradley in the mining business at that time?

A. Well, Mr. Fred Bradley was one of the outstanding mine operators in the world. He was the President of the Bunker Hill and Sullivan and had various other interests all over the Country.

Q. Where was his headquarters?

A. San Francisco.

Q. Now, what were the negotiations that took place in 1927 concerning these properties with Bradley, and what properties were you discussing at that time?

A. The entire field—the Meadow Creek Group, the Cinnabar Group and Antimony Ridge—they were all grouped into just the one thing, and they all belonged to the United Mercury at the time.

(Testimony of J. J. Oberbillig.)

Q. Now, at that time, did you enter into an option agreement with the Bradley interests?

A. Yes; on May 5th—on August 5th, 1927, we entered into the first contract.

Q. Now, state in a general way what the terms and conditions [22] of that contract were? May I approach the witness, please, your Honor?

The Court: You may. Is that an exhibit in this case?

Mr. Carver: Yes, your Honor.

The Court: What is the exhibit number?

Mr. Carver: It is not an exhibit, I beg your pardon. I plan to offer it.

The Court: Very well. Go ahead.

The Clerk: Exhibit 6 for identification.

(Petitioner's Exhibit 6, Witness Oberbillig, marked for identification.)

Q. Now, handing you what has been marked as "Exhibit 6 for Identification," Mr. Oberbillig, I will ask you if that is a copy of the 1927 agreement that you have just referred to? A. Yes, sir.

Q. That is the contract that was entered into with the Bradley Mining Company at that time?

A. That was the first contract.

Mr. Carver: If the Court please, we have submitted a copy to counsel and have submitted the original books of record of the Corporation—they have seen the contract. We do not have an executed original other than the official one in the corporate records.

Mr. Picco: We are willing to stipulate that in,

(Testimony of J. J. Oberbillig.)

your Honor. I am acquainted with it. I have looked it over. I was up until 11:00 o'clock last night looking over this stuff.

The Court: And you are willing to stipulate that the [23] copy marked as Exhibit——

Mr. Picco: Is a copy of the original.

The Court: Is a true and correct copy of the original?

Mr. Carver: With one exception, if the Court please, and that is that the claims listed are not set forth in detail—I think it may be stipulated that they were the same ones which occur in the later contracts. They are referred to by groups and we did not list them.

Mr. Picco: If counsel moves for admission, I have no objection.

Mr. Carver: I move the admission of the exhibit, your Honor.

The Court: Very well. As there is no objection, Petitioner's Exhibit Number 6 is received.

(Whereupon, Petitioner's Exhibit 6 for Identification, Witness Oberbillig, was received in evidence.)

Mr. Carver: Now, if the Court please, in connection with this exhibit, there were subsequent modifications and so on, which again have furnished to counsel. It would be agreeable with us to have the witness just summarize that there were such, but if counsel——

Mr. Picco: Why don't you put in the last one

(Testimony of J. J. Oberbillig.)

there prior to '44; leave the modifications out of it.

Mr. Carver: I think it is agreeable with counsel if I [24] may approach the witness again, your Honor.

The Court: You may.

The Clerk: Exhibit 7 for identification.

(Petitioner's Exhibit 7, Witness Oberbillig, marked for identification.)

Q. (By Mr. Carver): Handing you what has been marked as "Petitioner's Exhibit 7 for identification," is this the 1939 contract with the Bradley Mining Company?

A. Yes, sir; that is what this is.

Mr. Carver: I believe it may be stipulated by counsel this is also a copy, again excluding the description of the claims of the 1939 contract with the Bradley Mining Company.

Mr. Picco: Respondent has no objection to the introduction of that in evidence.

The Court: Very well, there being no objection, Petitioner's Exhibit 7 is received in evidence.

(Whereupon, Petitioner's Exhibit 7 for identification, Witness Oberbillig, was received in evidence.)

Q. (By Mr. Carver): Now, Mr. Oberbillig, during 1944, a considerable amount of tungsten ore was removed from the so-called Hennessey Group. It is correct, is it not, that this was the ore which resulted in the values in question—that is, the

(Testimony of J. J. Oberbillig.)

tungsten which Bradley took out in '44 came from the so-called Hennessey Group? A. Yes, sir.

Q. The Hennessey Group is within the Stibnite property and [25] identified on the Exhibit. Would you tell the Court what the Petitioner Corporation did with respect to the location and development, initially, of the Hennessey Group, beginning in the early 1920's?

A. Well, in 1923, I constructed this trail around, located all those claims and I didn't want to record those claims that year because I had so many claims to do assessment work on; and that fall, in October, Mr. Hennessey put his location notices on them and recorded them. That was a very tough blow, but even at that, we went along, and in 19—when I made the deal with Mr. Bradley in 1927, Mr. Bradley purchased those claims and his geologists, his engineers, failed to find any ore after Mr. Bradley had spent in the neighborhood of thirty thousand dollars.

Q. Now, if I may interrupt you to clarify the matter, he purchased them from Hennessey, is that correct?

A. From Hennessey, yes, which was the Great Northern Mines Company at that time.

Q. You had, prior to that, located—actually done some work on them? A. Yes, and lost them.

Q. And lost them? Now, would you describe for the Court, the nature of the ore structure on the Hennessey Group, and particularly the showings as

(Testimony of J. J. Oberbillig.)

disclosed by the developing and prospecting work which your Company did in the early stages?

A. When it was recommended to Mr. Bradley by his chief geologists and his engineers that there wasn't any ore there, Mr. [26] Bradley abandoned his contract, and I immediately took the matter up with Mr. Bradley that I was very certain that his geologist and his engineer didn't know what he was talking about. Now, Mr. Hershey (phonetic) was a very eminent geologist and recognized so, but I had done small development work—shallow cuts, you know, and I had the ore well determined on that property, so in '33, in February, I went to San Francisco and told Mr. Bradley the whole story, and Mr. Bradley says, "You go right back and locate that, and whatever it is," he says, "you think you can get them for twenty or twenty-five thousand dollars?" I says, "I think I can, and we will get it back into the enterprise." Well, unfortunately, Mr. Bradley passed away in July of that year. Then, of course, we had that cloud again, you know, to deal with. We had no leader then. Mr. Phil Bradley was a very good man and a fellow that was willing to take a chance, so it was a little later that fall—the mine just drug along then, until a little later that fall, Barney Brooke (phonetic) came to the mine with his engineer, and between Mr. Brooke and myself, we straightened things out; and although, prior to that, I had bought fifty-one per cent interest in the Hennessey Group, and after we had it all straightened out, why, the prop-

(Testimony of J. J. Oberbillig.)

erty was thrown into the enterprise then so that we could all participate.

Q. The United Mercury Mines Company then purchased the Hennessey Group and turned it over to Bradley between the dates of the 1927 contract and the 1939 contract?

A. Well, it went into the 1930 contract. [27]

Q. After 1927? A. Yes.

Mr. Picco: Have him explain what he means by the word "enterprise," I don't understand that.

Q. Now, at that time, Mr. Oberbillig, what physical work was being done on the properties by your Company?

A. Well, I carried on development work and proved up the ore so that Mr. Phil Bradley, when he came in that fall, so he could see what these—this work resulted in the proving of ore. I opened up sufficient ore—that ore structure at that one point was about five hundred feet wide and about eight hundred feet long. That is, it was thoroughly definitely proved that that ore was there, see?

Q. It is the case, isn't it, Mr. Oberbillig, that during the period following the 1927 contract when all of these properties were optioned to Bradley—that was all the properties in the Yellow Pine District—when you are referring to the "enterprise" you are referring to the development of the mineral potential in that entire area, is that correct?

A. Well, no; when I was referring to the minerals, I was referring to the Hennessey Group at that time.

(Testimony of J. J. Oberbillig.)

Q. I see, but now, when you—in your negotiations with Bradley——

A. Included everything.

Q. That included everything?

A. For a million and a half dollars. [28]

Q. That included Cinnabar and it included the Stibnite properties and the Antimony Ridge properties?

A. Yes; it was a million five hundred and fifty thousand dollars was the purchase price.

Q. That was the option of 1927?

A. Yes, sir.

Q. But your Company continued to perform developmental work after that, to develop it for that enterprise, isn't that correct?

A. Oh, yes; I kept up the work. I located hundreds of claims to fill in all over for the enterprise.

Q. That was after the date of—after 1927?

A. Yes, it was——(unfinished answer).

Q. Well, what mills were operating on the properties in the 1930's?

A. That was a pilot mill. It was designed to concentrate the ore and besides the pilot mill, there was a roasting plant put in there to volatilize and free the iron concentrate which carried the gold pyrites, you see, but that was a total failure.

Q. Who put that mill in?

A. Mr. Bradley put that in and it was quite a disappointment to him, and then the mill ran at a loss for approximately eight months.

Q. Now——

(Testimony of J. J. Oberbillig.)

A. It was a little more than eight months run at a loss.

Q. During the period after 1927, when this first option agreement was signed, did your Corporation determine at any time [29] that the Bradley Mining Company was not complying with their contractual duties in developing the property?

A. Did what?

Q. Did your Corporation determine that Bradley Mining Company was not living up to the terms of its agreement?

A. Oh, the Bradley Mining Company lived up to the terms of the agreement when Mr. Bradley was alive all along until after he had passed away.

Q. Now, after he had passed away, particularly in 1939, did the Corporation determine to cancel that contract?

A. The '39 contract was a new contract——

Q. To cancel the 1930 contract?

A. Yes; it cancelled all the previous contracts and they were merged into the '39 contract.

Mr. Carver: May I approach the witness, your Honor?

The Court: You may. If that is to be an exhibit, you had better have it marked for identification.

Mr. Carver: Yes, your Honor.

The Clerk: Exhibit 8 for identification.

(Petitioner's Exhibit 8, Witness Oberbillig, marked for identification.)

Q. Now, handing you what has been marked as

(Testimony of J. J. Oberbillig.)

“Exhibit 8 for identification,” Mr. Oberbillig, is that a copy of a resolution of your Corporation in 1939, concerning the performance by Bradley of the terms and conditions of the contract then in [30] effect? A. That is a correct copy of it.

Q. And that's a copy of what is taken from the original minutes book here before the Court?

A. Yes, sir.

Mr. Carver: This has been furnished counsel, and also the minutes books have been available.

Mr. Picco: I don't have a copy of that.

Mr. Carver: It is in that statement which I furnished.

Mr. Picco: There were a lot of things furnished, but I take it that that is correct, if you say so.

Mr. Carver: Yes, it is.

The Court: There is no objection?

Mr. Picco: No objection.

The Court: Very well, there being no objection, Petitioner's Exhibit Number 8 is received in evidence.

(Whereupon, Petitioner's Exhibit 8 for identification, Witness Oberbillig, received in evidence.)

Mr. Picco: That is a resolution. What year is that?

Mr. Carver: 1939.

Mr. Picco: 1939—that's the corporate minutes—stockholders' meeting?

Mr. Carver: Stockholders' meeting, yes.

(Testimony of J. J. Oberbillig.)

The Court: What date in 1939, can you give us the date of it?

Mr. Carver: That date, if your Honor please, is May [31] the 5th, I believe.

The Court: Do your minutes books show?

The Witness: Are you looking for that one?

Mr. Carver: Yes, for that one.

The Witness: It is in the other book. The resolution is in the other book.

Mr. Carver: Well, in the interest of time, if your Honor please, could I furnish that at the next recess?

The Court: Oh, yes; that's all right. You——

Mr. Picco: I may make this suggestion, if it is convenient, that we identify the corporate minutes—the two books, and not put them in evidence, but just, if necessary, read from the portions that are deemed material.

The Court: Well, I would like to have the documents into evidence, if possible, containing a correct recital of those minutes rather than to read them into evidence.

Mr. Picco: I may have occasion to go into the records in the corporate minutes once or twice. I don't have copies made out of that. It will be a short—I would like to be able to withdraw some of that just by word of mouth more than anything else.

Mr. Carver: The date, your Honor, was March 20th.

The Court: Very well.

Q. (By Mr. Carver): What was the purpose of

(Testimony of J. J. Oberbillig.)

the United Mercury Mines Company, the Petitioner Corporation, in turning over [32] the Hennessey Group to the Bradley interests?

A. Well, the real purpose for turning that over was to get it back into the enterprise and that we can get work started again. Mr. Bradley, at that time—I think it was '37, I am pretty sure, he closed Meadow Creek down because he didn't want to pay that eminent metallurgist who discovered the process for putting that ore, and putting the—working out the metallurgy that put the mine on its feet. Immediately, the mine went from the red into the black when this young metallurgical genius had that process worked out, and I doubt whether there was another man in the United States could have worked that thing out, outside of him.

The Court: Now, the Court is laboring under the impression that the Mr. Bradley first mentioned was deceased in 1930. Now, is there another Bradley coming into the picture?

Q. Yes; if you will identify that, Mr. Oberbillig?

A. Yes; that was Mr. John—Mr. Fred Bradley worked along—or Phil Bradley worked along nice—that was a brother to Fred Bradley, the old man—he was an uncle to the young fellow that came and took charge of it and then just because this young metallurgist was to have a royalty, he shuts that mine down.

The Court: Well, now, which one of them was it that died in 1930?

A. That is Mr. Fred Bradley.

(Testimony of J. J. Oberbillig.)

The Court: And when you——

A. No; in 1933. [33]

The Court: '33?

A. Yes.

The Court: And the Bradley you are speaking of now in 1939 was Mr. Phil Bradley?

A. No; that was Mr. John D. Bradley.

The Court: John D. Bradley. Very well.

A. The young fellow.

Mr. Picco: If your Honor please, Respondent would like to interject a comment: In our stipulation, we refer to the word "Bradley," and we are referring to the Bradley Mining Company where we do that, and I think that it might be agreeable with counsel that when we use the word "Bradley" by itself, we are referring to the Mining Company; and when we are referring to individuals, we should qualify them as "Mr." or some other——

The Court: Well, the given name. If you are referring to Fred Bradley, call it "Fred Bradley." If you are referring to John Bradley——

Mr. Picco: It is awful easy to get confused about this, because we don't know what we are talking about a good deal of the time here with all these claims. We are all over the county of——

A. Well, I think that is very nice of you.

Q. (By Mr. Carver): Now, Mr. Oberbillig, would you describe the activities of your Corporation, the United Mercury Mines Company, in connection with securing the Government drilling pro-

(Testimony of J. J. Oberbillig.)

gram for these [34] properties, and particularly the Hennessey group?

A. I had opened up the ore during '33, before there was very much work done on that, but we had to have ore, and—now, in 1926 and 27, I worked down there. However, the property was already turned into the Bradley Mining Company, you see, and into the enterprise. We agreed to that in our contracts, that any property located, you know, within the exterior boundaries of the property belonged to the enterprise, and that was a protection for both companies.

Mr. Picco: The "enterprise" meaning Bradley Mining Company? A. That's right.

Q. Now, again, Mr. Oberbillig, what did your Corporation do to get a Government drilling program on this particular property?

A. In 1937, I took my—all the pictures that I had—my movie reel and everything, and I went to Washington. I conceived the idea that the prospectors were extinct—we didn't have any of the old-time prospectors to look for ore, and I used the argument that war was inevitable with Germany, so I talked up with the Bureau of Mines and Geological Survey whether it wouldn't be a good plan for the Government to put on a drilling program, and I had a very favorable response from the Bureau of Mines, and of course, I was well acquainted with several congressmen and senators, and especially with Compton White from Idaho, who was a very ardent worker; and finally, the spring of

(Testimony of J. J. Oberbillig.)

'39, Congress appropriated the money [35] for the drilling program and the Bureau of Mines gave me the opportunity to sign the first contracts that were signed in the United States to drill for strategic minerals.

The Clerk: Exhibit 9 for identification.

(Petitioner's Exhibit 9, witness Oberbillig, marked for identification.)

Q. Handing you what has been marked as "Exhibit 9 for identification," Mr. Oberbillig, would you state what that is?

A. That is the contract with the Government.

Q. That is the Minerals Exploration Contract?

A. Yes.

Q. And what properties did that have reference to?

A. That had reference to the Hennessey Group.

Q. Did you execute that contract? A. Yes.

Q. Along with Bradley and the United States Government? A. Yes. Now——

Q. This is an original copy, is it not?

A. Yes, that's all right.

Mr. Carver: Copies have been furnished to counsel. A. We want to expedite this.

Mr. Carver: We would like to introduce this into evidence.

Mr. Picco: I would like to ask a question about this. Now, Mr. Oberbillig—John D. Bradley signing for Bradley Mining Company on this, did he [36] not? A. Yes.

(Testimony of J. J. Oberbillig.)

Mr. Picco: And he participated in this as much as you did, did he not?

A. Yes, sir. No, not in the—he had nothing to do with it. We were to drill this the previous year, but he run us off, and then I had the Bureau of Mines come, and then we signed with Bradley that contract. That is the copy of the original contract all right. Yes, sir.

Mr. Picco: Well, just—— (interrupted)

A. Bradley wanted his name attached to it because all the other contracts were signed by me, you know, and I figured that I could sign the contracts to drill because he only had an option on the property.

Mr. Picco: Now, Mr. Oberbillig, you couldn't have gone out and drilled without his permission, could you?

A. Well, I don't know. Probably—we'd have probably tried it.

Mr. Picco: You want to tell the Court then that this signature is on here simply because he wanted to sign it; not because it was necessary?

A. Oh, he didn't like it at all. I will explain that to the Court:

Mr. Picco: I wish you would.

Mr. Carver: If the Court please, I would like to state at this time that it probably is more proper for cross-examination [37] than—— (interrupted)

Mr. Picco: You are right. I have no objection to this, your Honor.

The Court: Very well, there being no objection.

(Testimony of J. J. Oberbillig.)

Petitioner's Exhibit Number 9 is received in evidence.

(Whereupon, Petitioner's Exhibit 9 for identification, witness Oberbillig, was received in evidence.)

Q. (By Mr. Carver): Now, after that contract was signed, did the drilling take place on those properties?

A. Some time afterward a little. Mr. Jackson (phonetic), the Chief Engineer of the Bureau of Mines, telephoned me from Las Vegas, and he says "I guess we won't have a chance to drill that pet property of yours?" Well, I says, "You come on," I says, "I think we can drill," I says, "I assure you that we can drill." So they came and then Mr. Jackson and Mr. Gardiner and Mr. Lorraine (all phonetic), we visited the properties that they had previously drilled. Then I took them over and introduced them to Mr. John Bradley and he was kind of cold, you know. I says, "We are going to drill." So, when they stood around there and Mr. Jackson says to me, "My God, John," he says, "are you going to drill this ground here?" I says, "We sure will." I says, "We sure will." I says, "There is a lot of compound faulting here and I look for a big mine here for antimony and we are liable to have it," and I says, "and we will need that metal." I says, "I didn't know anything about the tungsten." The first hole that was put down, through thirty-five feet of debris [38] disclosed seven—

(Testimony of J. J. Oberbillig.)

thirty-two feet of tungsten ore—high-grade tungsten ore.

Q. That was the first discovery of tungsten?

A. First discovery of tungsten ore and then we drilled six or seven more holes there, and then we worked out the 1941 contract.

Q. Now, you were there—— (interrupted)

Mr. Picco: If your Honor please, I want to tie this witness down to some of the years here. I mean, he is rambling all over the place, and I don't mind that so much if he would just tie it into the property and into the year.

The Court: Yes. Well, let us have that clear.

Q. What year did that drilling take place?

A. The drilling took place during July—either July or August of 1941.

Q. That was under the terms of this contract?

A. Yes, sir.

The Court: Under the 1939 contract and your contract with the Government?

A. Yes, that was done under that contract—1939.

Q. And you were there representing your Company and participating in that program at that time, is that correct?

A. I was there practically all the time to see what the results would be.

Q. Now, you mentioned, I believe, that you had the Bureau of Mines—came in there after 1939. Would you state to the Court what [39] activities your Company performed in this prospecting and

(Testimony of J. J. Oberbillig.)

other work in which you were assisted by the Bureau of Mines, beginning in 1939 up to 1944?

A. The Bureau of Mines finished drilling on this that summer, on the Hennessey Group, and then the next year, they went over onto Cinnabar and drilled that. I run into the same difficulty there because the Bonanza people didn't want any interference with the Government. Now, those were the only properties been drilled at that time.

Q. Were Bureau of Mines personnel on the grounds prior to this drilling? A. Prior to it?

Q. Prior to the 1941 drilling?

A. Mr. Lorraine (phonetic) was there—he was the one—he was the Chief at that time in the field, you know, for the drilling program.

Q. That was prior to the drilling?

A. And he was refused permission to drill on the Hennessey property in '40.

Q. Who took him in there? A. Huh?

Q. Who took Mr. Lorraine in there?

A. Oh, Mr. Lorraine went in himself. I had taken him in there, and he knew the country.

Q. Now, just to tie it down, this tungsten discovery on the Hennessey Group was at the place where the big mine operated which [40] produced the values in 1944, is that correct?

A. That is correct, yes.

Q. That is what they call the “common pit” there?

A. Yes, the big pit, and that pit produced far

(Testimony of J. J. Oberbillig.)

in excess of twenty-five million. Bradley had so stated in his affidavit in the other case.

Q. Now, beginning in 1921 up through 19—the end of '43, what was the total capital investment of your Corporation in work on these properties?

A. Oh, around four-hundred thousand dollars.

Q. Was the matter of the cost for the capital investment the subject of a revenue examination about 1937?

A. Was a what?

Q. Didn't your Corporation have—didn't the matter of these values come into controversy concerning some income tax liabilities in the early 30's?

A. That was in '36—either '35 or '36.

Q. And at that time, Mr. Oberbillig, did you and the Internal Revenue Department come to an agreement concerning the amount of your capital investment as of that time?

A. I wish I knew the young fellow's name—he is here connected with the Bureau—with the Revenue Department—I don't know his name. He and my secretary, who was a very high-class and honorable man—he was with me for fourteen years, and he had the idea that the United Mercury should have its capital investment back [41] before it had to pay income tax, so Mr. Calch (phonetic) was sick and he left me and I hired Mr. Middleton (phonetic) then, and we went to Salt Lake City and we worked out that proposition there, and well, the tax people in Salt Lake then told me that—we were kidding a little, too, and he says, "Well, you have got us hooked for about two thousand dollars." I says,

(Testimony of J. J. Oberbillig.)

“How come?” He says, “The Statute run against you.”

Mr. Picco: If your Honor please, I think so much of this is——

The Court: Yes, that is immaterial.

Mr. Carver: May I approach the witness, your Honor?

The Court: You may. The conversations are not material in this.

The Clerk: Exhibit 10.

(Petitioner's Exhibit 10, witness Oberbillig, marked for identification.)

Q. I hand you what has been marked as “Exhibit 10 for identification.” Is this the evaluation report you got from the Internal Revenue Department involving the years in question, 1933 and 4?

A. Yes, I am sure this is.

Q. This came from the records of the Company?

A. Yes, this, I am pretty sure that that is the same one.

Mr. Carver: Now, I have previously shown this to counsel. I am sure that he hasn't had time to make a study of it.

Mr. Picco: I don't remember reading it. I would like [42] to look at it.

(Document handed.)

A. Well, anyway, Mr. Picco, whatever that was, you know, when he said that I—my—Statute had run against him, I told——

Mr. Carver: Well, now, the Court ruled that——

The Court: That is not material in this case.

A. Oh, that's out?

(Testimony of J. J. Oberbillig.)

Mr. Picco: Were you introducing this?

Mr. Carver: We offer this in evidence for the purpose of showing that as of 1933, the capital investment was about three hundred and thirty thousand dollars, based upon the valuation engineer's report, which this is—it is a carbon copy. We do not have the original.

Mr. Picco: I would like to ask a question: Do you know anything about this report? Who signed it?

A. Marcell (phonetic)—not Marcell, but I just can't think of the fellow's name.

Mr. Picco: This wasn't—this was addressed to the Internal Revenue Agent in Charge, Salt Lake City?

A. Yes, he is the big man in there.

Mr. Picco: You are not familiar with anything that was done here or how this was prepared?

A. Oh, I sit all through it, you know, but I don't remember very much about it. All I remember, you know, I straightened out [43] my account with them—whether Statute or no Statutes.

Mr. Picco: You don't know whether it was referring to valuation of the mining claims or what it is, do you?

A. Oh, I know they put a certain valuation on it, and I let it go.

Mr. Carver: I believe it speaks for itself, Mr. Picco.

A. I think it was around——

Mr. Carver: This is a Government—this is a Government report.

(Testimony of J. J. Oberbillig.)

Mr. Picco: Your Honor, I absolutely object to this going into evidence. I see that it has no materiality. In fact, this witness can't identify this properly—can't tell us what it is. It could be referring to a thousand other things. It is, as I examine this—it is going to the Internal Revenue Agent in Charge in Salt Lake City. To whom is it going?

Mr. Carver: It is signed by the Internal Revenue—it is shown—it is a copy showing the——

The Court: Let me see the document, please.

Mr. Picco: I want the Court to look at this. I do think we are getting rather far afield. I don't think that this helps. I think he may make his own statement as to his own knowledge of things. I don't see why we have to pick on the private correspondence of the Internal Revenue Service to prove anything in this case.

(Document handed.)

Mr. Picco: I further object on it that if it is an agreement [44] of the value, that is not the material thing. If he wants to testify of his own knowledge what it is, your Honor, and has knowledge, that would be more proper. Not only that—I just glanced at that—I haven't had time to examine it. It looks to me like that it is really covering the whole county—Valley County, Idaho. It doesn't apply only to the property in question.

The Court: Well, there is some evidence—there is some indication that this was a report supplied him by J. D. Carr, Engineer Revenue Agent, and it does indicate what the Revenue Agent said that

(Testimony of J. J. Oberbillig.)

may be accepted as the actual cost of the properties. And this is directed, of course, to the Internal Revenue Agent in Charge. I take it the original report was sent to him and a copy of the report was sent to this party. While I may say that it is not absolutely binding, it is some indication of the value of the property and I wish you would look it over. We are going to recess now for about ten minutes, and look it over, and if it will be of any benefit to the Court, why, I would be glad to have it.

Mr. Picco: Yes, your Honor.

The Court: And if you can withdraw your objection, I will appreciate it.

Very well, we will be in recess for about ten minutes.

(Whereupon, a recess was taken at 11:15 o'clock a.m. until 11:35 o'clock a.m., at which time the hearing reconvened, with the parties heretofore mentioned being present.)

The Court: Very well, you may proceed, gentlemen. [45]

Mr. Picco: If your Honor please, we were discussing this Exhibit 10. Respondent has interjected an objection and we maintain our objection, that it is not material; secondly, that this person cannot properly identify this and lay the foundation for the entry of this in evidence; third, this deals in valuations and doesn't go into costs—doesn't show; and fourthly, as far as I can see, it is referring to claims that may not have a thing to do with the particular

(Testimony of J. J. Oberbillig.)

piece of property we have in evidence and in this proceedings.

Mr. Carver: As to the last point, your Honor, we can further identify those—they are the same. As to the earlier points, it is corroborative, we will admit, but we think, nevertheless, that it is relevant and it is competent, because it tends, by a carbon copy of a report, that the Government back up what this witness has said about what he had in this property by way of cost—to show a substantial figure.

The Court: Well, I am going to admit it for what it's worth. I am going to overrule your objection, but I will say this, if I find that it is incompetent and irrelevant, I am going to disregard it, so don't rely on that entirely in your proof of valuation.

Mr. Carver: That's agreeable, your Honor.

(Whereupon, Petitioner's Exhibit 10 for identification, witness Oberbillig, was received in evidence.)

Q. (By Mr. Carver): Mr. Oberbillig, I ask you about the nature of the cost of the capital commitment in these properties— [46] what was your—how much money was raised and put into these properties during the period from the time of incorporation up until 1944?

A. There would be around four hundred thousand dollars through the—yes, a little more, probably, four hundred and fifty thousand, through the

(Testimony of J. J. Oberbillig.)

sale of stock. But you know, in the early stages, the stock was sold at five cents a share and in many cases, I gave back—or paid back the money, you see, that they had put in, and give them eight per cent interest on it, and then I resold the stock at ten cents and took and put the money into the treasury, and I think that there was something like eighty thousand dollars went into the treasury. I know it is passed seventy thousand from there——

Q. The money——

A. ——the money that was spent would raise the ante.

Q. The money that was raised was spent on the property, is that correct? A. Do what?

Q. The money went onto the property?

A. Oh, yes, every bit of it went on the property.

Q. What was your salary during this period?

A. Seventy—I drew around seventy-five dollars; then for a long period, thirty-five dollars a month.

Q. A month?

A. Then I think there was one time there I drew a hundred and [47] fifty dollars. But I all the way through paid my—all my expenses in raising this money, except for one hundred dollars, and I don't know how that got on the books.

Q. And the money that you raised then, did not go for administrative overhead for you, for salaries and such as that—went on the property?

A. Oh, yes.

Q. Now, what was it used for on the property?

(Testimony of J. J. Oberbillig.)

A. For development and to improve the property, and to keep——

Q. What was done——

A. ——things a going.

Q. I beg your pardon?

A. And to keep things a going.

Q. What—salaries——

A. And I paid—I paid my secretary and auditor seventy-five dollars a month, you know. That was a lot of money.

Q. But you raised over four hundred thousand dollars and spent it on this property, is that correct?

A. Oh, yes, it was more than that spent.

Q. Speak up so the Court can hear you.

A. I say there was more than that spent there.

Q. On the property?

A. You see, we sold ore, too, you know.

Mr. Carver: May I approach the witness, your Honor? [48]

The Clerk: Exhibit 11 for identification.

(Petitioner's Exhibit 11, witness Oberbillig, marked for identification.)

Q. Handing you what has been marked as "Exhibit 11 for identification," being a group of three photostats, state if you will what those are?

A. This is the entire group up to 1930 of the—what we always called the Meadow Creek and Cinabar Group and the Sugar Creek Group.

Q. That is a map, is it not?

A. That is the map—that is the map made by myself at that time.

(Testimony of J. J. Oberbillig.)

Q. And what are the next two documents?

A. Those are—those are photostats that I got from the Hennessey—had them made for the Hennessey property and it would give Mr. Picco a more clearer idea of the location, is that right?

Mr. Picco: It wouldn't give me a more clear picture.

Mr. Carver: Now if the Court please, these we offer into evidence as the detailed representation of the exhibit, particularly the Stibnite property, and then the detailed showing on the other two as to the Hennessey property—a bigger scale drawing of the Hennessey property.

The Court: I take it counsel for Respondent would be glad to receive it and would have no objection to it, is that correct?

Mr. Picco: I have no objection if it is for that purpose. [49] In other words, it explains Exhibit 3-C a little better?

Mr. Carver: That's all.

Mr. Picco: Because it won't be of too much help to me, because there is too much data on it.

The Court: Petitioner's Exhibit Number 11 is received in evidence. And I don't know whether the record shows that Exhibit Number 10 was received. It showed that the objection was overruled, but to be on the safe side, let the record show that Exhibit 10 was also received in evidence.

(Whereupon, Petitioner's Exhibit 11 for identification, witness Oberbillig, was received in evidence.)

(Testimony of J. J. Oberbillig.)

Q. (By Mr. Carver): Now directing your attention, Mr. Oberbillig to the period subsequent to the 1941 contract, and particularly in the winter of 1943—what, if anything, did your Corporation do to assist in the operation—participate in the operation of this Stibnite property?

A. In 1943, the Idaho Power had made the statement that it would be practically impossible for them to get electricity into Cinnabar and perhaps not into Stibnite. So, I was meeting with the President then, with that, and I told him that I would have—I would make arrangements to assist, so I put two big D8 Caterpillars on—never charged them a cent for it, and finished the highway and we had our wires and everything up for the Cinnabar Group, and then I took my Cats and went over on the Meadow Creek side, clear over to No Man (phonetic) and constructed that road and pole [50] line for the Idaho Power and the Idaho Power workmen had made affidavits to that effect, that I don't think are in this case. They were in the Bradley case, and all that was done without charge.

Q. So in the winter of '43, you did certain road work to build—on behalf of a transmission line?

A. That was all for the transmission line, and then, of course, I had done a lot of work on the Midnight Group, opening up ore in '23 and also—

Q. In '43?

A. I mean '43 and then '44, and even in '45, on the Smokey Ridge and those other groups on which Bradley had an option.

(Testimony of J. J. Oberbillig.)

Q. Describe what is the Midnight Group now? That's——

A. The Midnight Group lies on the east side of the Meadow Creek Group and is adjacent to the Meadow Creek—joins up with it.

Q. That is described in the 1941 contract under a separate option, is that correct?

A. Yes, but there was no charge made for the Midnight Group when it was put in.

Q. Now, what work did you do on the Midnight Group during this period then—what developmental work did you do?

A. I opened up ore with the Cats on that—on the original Midnight claim and also on the Garnet (phonetic) Creek claim.

The Court: Now, when did you do that? What year? [51]

A. That was in '23 and—I mean '43 and '44. It all linked together in those years.

Q. You were actually then, on the Midnight property, doing work at your expense on the Midnight Group? A. Oh, yes.

Q. Which was under option to Bradley?

A. Yes, sir.

Q. And the Bradley Company later took it over?

A. Yes, sir.

Q. Now, when did they take it over?

A. I think that deal was made in thirty—in '43—the fall of '43—I'm sure it was in the fall of '43. It might have extended into '44.

Q. Now, you had these Cats and what were they

(Testimony of J. J. Oberbillig.)

doing again? What work was performed? What type of work?

A. They done the building of the roads so we could get the material in to build the powerline.

Q. And with reference to the Midnight Group, what was done there?

A. That's where we crossed the Midnight Group—we crossed the Meadow Creek Group, we crossed the Midnight Group to get into the Cinnabar Group.

Q. But on the Midnight Group, did you do any developmental work?

A. Oh, yes, we run—the roads were run and we cut the ore [52] all along there on that ore structure there.

Q. Now, explain to the Court if you will what you mean by "cutting the ore"?

A. Well, opening it up, that's what that means.

Q. With what?

A. With the Cats—with a Caterpillar, you know.

Q. Just describe in some detail how that works, if you would, so the record will show that.

A. Well, we'd get on to the ore vein and plow out the ore to see how extensive it would be—we would have some way to figure out how extensive it would be. Now, I—

The Court: Was there an overburden or something on the ore that you removed with the—

A. Oh, yes, you know, and get it cleaned off. On Antimony Ridge, I entirely mined with the Caterpillar and took out—I think it figured something like a hundred and ninety thousand dollars.

(Testimony of J. J. Oberbillig.)

Q. Would you describe for the Court what the terrain is like on these groups? A. The what?

Q. What's the terrain like—what's the nature of the hills, are they steep or flat—what type of country is it? Give the Court a verbal picture of that?

A. Well, we were close—when we were digging out for that stuff on Midnight, we were very close to the top of the hill then, where it rounded off, and on both sides—Midnight was on the east [53] side and Garnet Creek was on the west side of the mountain, see?

Q. Was that land timbered? A. Huh?

Q. Was it timbered? A. Timber?

Q. Yes.

A. Oh, yes, there was timber in there, sure.

Q. When you were working those Cats, you were working in along those ores——

A. We'd open up, you know, wherever I found a fault line or something that had any showing of ore—some ore structure, we'd open that up. There's hundreds of places where ore is opened up on that property.

Q. Hundreds of places?

A. Hundreds of them, yes, and it was all done——

Q. You did that work with Caterpillar tractors?

A. In the early day—in the early day, we did it with a pick and shovel; but after we got a Caterpillar in there, these were Caterpillars, too, they were Eight Cats—D8 Cats—they were big Cats. They belonged to the United Mercury Mines.

(Testimony of J. J. Oberbillig.)

Q. In 1943 and '44, you had them working?

A. You betcha.

Q. Developing this property?

A. Yes, sir. [54]

Q. The Midnight Group? A. Yes, sir.

Q. You also had them on this road for this transmission line?

A. Yes, and also on the Antimony Ridge.

Q. Now, directing your attention to the year 1944, did there come a time when Bradley Mining Company put in a treatment plant at Boise for this tungsten ore that was coming out? Did that happen in 1944?

A. That happened in 1943. That was to leach and recondition the tungsten concentrates to upgrade it, you know, and it would bring a better price.

Q. That was a treatment process in connection with the ore? A. Yes, sir.

Q. Now, where was that plant built?

A. That was built on South Ninth Street, in Boise.

Q. And how far is that from the mine?

A. That would be right around a hundred and sixty-five miles.

Q. And how far is it from Cascade, Idaho?

A. Eighty miles.

Q. Now, with reference to that treatment plant in Boise, did your Company—United Mercury Mines Company, participate in the cost of construction of that?

A. Yes, sir, we paid two dollars and a half a

(Testimony of J. J. Oberbillig.)

ton from the mines to Cascade, on concentrates and from Cascade to Boise, five [55] dollars a ton. These figures are taken directly from the settlement sheets that Bradley furnished me.

Q. Was this amount outside and additional to the amount provided in the December 31, 1941, contract? A. Yes, very much so.

Q. Now, I believe you stated a moment ago that your Company, the United Mercury Mines Company, paid a proportionate share of the cost of that plant—how did you do that?

A. I didn't get that question.

Q. You stated a moment ago that the United Mercury Mines Company, paid a portion of the cost of the construction of that plant at Boise—that treatment plant—how did you do that?

A. It wasn't—the United never put a dime in that plant so far as construction was concerned, but after the plant was constructed and operating, the United was charged for the treatment there, and not only for the treatment, but also for the amortization of the plant.

Q. That's the point. They were charged for the depreciation of that?

A. Yes, and that's right there in these settlement sheets that they rendered.

Mr. Carver: May I approach the witness, your Honor?

The Court: You may.

(Petitioner's Exhibit 12, witness Oberbillig, marked for identification.)

(Testimony of J. J. Oberbillig.)

Q. Now, handing you what has been marked as "Exhibit 12 for [56] identification," I will ask you to state if that is one of the settlement sheets having to do with the purification plant at Boise?

A. Yes, sir.

Q. And for what year was that—what date was that—is that there?

A. This is November 14, 1944. Now, I will say in connection with this, that most of our '33 and '34 settlement sheets have been scattered around among the attorneys, you know, in the Bradley case, and——

Q. Now, just a minute——

A. ——I have been unfortunate in not locating it. The Court: You mean '43 and '44?

Q. '43 and '44? A. Yes; '43 and '44.

Q. Now, this shows a deduction for operating costs applicable, including depreciation—is that the item you are referring to? A. Yes, sir.

Q. Now, is this a representative settlement sheet handled in the same manner as the other lots for——were, for those shipments which went through the treatment plant in Boise?

A. Oh, there is a lot of these costs there, with not much more than the sales values is up here, of eighty thousand six hundred and fifty-five 0 nine—they are marked even up as high as nineteen thousand dollars cost——

Q. I don't mean representative as to size, Mr.

(Testimony of J. J. Oberbillig.)

Oberbillig. [57] My question: Is this the kind of settlement sheet——

A. They are all this way. They are just made by Bradley, they don't——

Q. And they all show a deduction for that depreciation? A. Yes.

Q. In effect, they were charging you for a portion of the cost?

A. I told Mr. Bradley that I would just as soon go along in proportion with my economic interests in any of the costs that he would have. Well, he says, "We're building up—we're going to put in a two thousand ton plant after the tungsten's out."

Mr. Carver: Now, if the Court please, this isn't the one I showed counsel, but the one I did show counsel is just like it. There are several representative ones. And I will offer it into evidence.

Mr. Picco: May I inquire a little? Mr. Oberbillig, I don't understand that first page, just how—what does that all mean? "Gross sales value per attached invoice, eighty thousand plus?"

A. Yes, now, they have a lot of other sheets, you know, that they put out, you know, and they was so ambiguous that I could hardly under——

Mr. Picco: Speak to the Judge, if you please.

A. I could hardly understand them, you know. But the only thing I can do is take this value and I made my kick about that. Well, Bradley always would say, "Go on—you might as well go along with us." And I yielded, because I wanted to see that operation move along. Well, you see, this is the

(Testimony of J. J. Oberbillig.)

absolute cost now, which [58] includes—see less operating cost, see? And that includes the—I can make that more clear to you if I had the complete sheet here to show, you know, just how they settled with us.

Mr. Picco: Well, what did——

A. This is an awful charge here.

Mr. Picco: You say you were charged something. Now, what did you pay there, according to that Exhibit 12?

A. This deduction, you know, takes out our royalty of five per cent out of this up here, see (indicating), and that is what was subject to royalty here, of seventy-three thousand eight hundred and seventy-three forty-five. Now, he had no right to make these charges, but I yielded. Now, I would have got five per cent on the eighty thousand six hundred and fifty-five—that is, my Company would. You see, that is definitely clear here.

Mr. Picco: As I understand this now, he is telling you by this Exhibit 12, that is, Bradley Company is, that the royalty you are to receive is seventy-three thousand eight hundred and seventy-three and forty-five cents?

A. That's subject to five per cent, see?

Mr. Picco: That's subject to five per cent?

A. Yes, but if he hadn't have taken this deduction here, it would be subject to the eighty thousand.

Mr. Picco: Now, you didn't have to send him any check in connection with that, did you?

(Testimony of J. J. Oberbillig.)

A. Oh, no, no; he run that his own way. [59]

The Court: That was taken out of your royalty, in other words?

A. Yes, sir.

The Court: Is that the idea?

Mr. Picco: It appears to be, your Honor.

Mr. Carver: That point—the point, for the information of the Court and counsel is that the royalty figure was computed after his bearing, by sharing in five per cent of the depreciation of the cost of this treatment process——

The Court: I see.

Mr. Carver: ——which was over and above, as will be seen from the contract itself—the terms of the contract.

The Court: Very well. Is there any objection, Mr. Picco?

Mr. Picco: No objection.

The Court: There being no objection, Petitioner's Exhibit Number 12 is received in evidence.

(Whereupon, Petitioner's Exhibit 12 for identification, Witness Oberbillig, was received in evidence.)

Q. (By Mr. Carver): Now, you stated, I believe, that the same type of depreciation deduction was made on all of these settlement sheets?

A. On every one of them——

Q. For the ones in which the purification [60] plant——

A. Except there is a whole lot more added to a lot of them.

(Testimony of J. J. Oberbillig.)

Q. Now, Mr. Oberbillig, in connection with this transportation—did you pay—did your Company pay, outside and beyond the terms of the contract, the charge for the transportation of that ore to Boise——

A. Five dollars a ton.

Q. ——disproportionate to the amount of the actual cost?

Mr. Picco: I wonder if we could explain to the Court just what the contract provides for that—give him the full picture?

Mr. Carver: Yes, I think so. If the Court please, the contract calls for two dollars and a half transportation allowance for bringing the ore to the rail-head at Cascade. I am going to ask the witness, I will now:

Q. Now, what was the usual and normal cost of bringing ore from Cascade to Boise, per ton?

A. From Cascade to Boise?

Q. Yes.

A. Oh, right around ten dollars—fifty cents a hundred would be, you might say——

Q. You bore five dollars of that instead of five per cent, is that correct?

A. It was in excess of my proportion that I should pay.

Q. That's the point—you bore that additional by way of participating—trying to help this thing go along, is that correct?

A. Yes, sir; I was always ready to go with Bradley if he [61] wouldn't exceed that charge.

(Testimony of J. J. Oberbillig.)

Mr. Carver: Mr. Reporter, did that get through the noise of that truck?

The Reporter: Yes, sir.

The Court: Gentlemen, how much time do you think it will take to finish this case?

Mr. Carver: If the Court please, we are almost through with our direct examination.

The Court: Is this the only witness you have?

Mr. Carver: This is our only witness, yes, your Honor.

The Court: And how long do you think it would take for your cross-examination?

Mr. Picco: Well, I think at least an hour; maybe more.

The Court: Well, we will have plenty of time to finish this afternoon?

Mr. Picco: Oh, yes.

The Court: Well, we have the entire day for this so that we might as well recess now until 2:00 o'clock and finish up this afternoon.

(Whereupon, a recess was taken at 12:00 o'clock noon until 2:00 o'clock p.m., at which time the hearing reconvened, with the same parties heretofore mentioned being present.)

The Court: Very well, you may proceed, [62] gentlemen.

Direct Examination

(Continued)

By Mr. Carver:

Q. For the record, you are Mr. Oberbillig, pre-

(Testimony of J. J. Oberbillig.)

viously sworn. I just have two questions: Mr. Oberbillig, has the United Mercury Mines Company, with reference to the Hennessey Group and the other claims, the subject of this contract of December 31, 1941, at all times since 1941, paid its taxes and claims been allowed depletion based upon ownership of an economic interest in the ore in place?

A. Yes, sir.

Q. Beginning in 1921 and continuing down to the date of this hearing, has the United Mercury Mines Company at all times been an active mining company, actively engaged in prospecting, developing, and operating mines in the Yellow Pine Mining District of Idaho?

A. Yes, sir.

Mr. Carver: Your witness.

Mr. Picco: Thank you.

Cross-Examination

By Mr. Picco:

Q. I want to ask some preliminary questions on definitions, primarily, and the use of some of your words. You mentioned that you "blocked out" ores on the Stibnite group of claims in the '20's; you remember that, don't you, Mr. Oberbillig, in your testimony here this morning?

A. Yes, sir.

Q. What do you mean by "blocked out"?

A. That is—you block out ore—you get in on the vein, you see, on the ore itself and then you run a raise up on it and then [63] drift on it again, you know, see, and then, of course, you run a raise up through to the surface, even, if you got ore—or even if you have it on the surface, then you have a fine

(Testimony of J. J. Oberbillig.)

way to estimate the number of tons and to assay the value and you have got practically a correct—you got a pretty correct amount of value that's in all that stuff, you see?

Q. Now, in blocking out these ores in the '20's, actually what you had there were ore deposits of gold and antimony, is that right?

A. On Meadow Creek, yes, sir.

Q. No tungsten ore was discovered or developed in the '20's? A. When?

Q. In the '20's? A. In '20, you say?

Q. In the '20's? A. No; it was——

Q. In fact, there was no development or discovery of tungsten until the year '41 or '42, wasn't it—after the Government came in, the Bureau of Mines?

A. In '41 was when the tungsten was discovered——

Q. That's fine.

A. ——in commercial quantities, see?

Q. That's fine. I will ask a few more questions later on that. I just wanted to get that straight, that we are dealing with tungsten in this case, aren't we? [64] A. That's right.

Q. Now, I received the over-all impression from your testimony this morning that you personally did the developing and exploring of some of the mining claims in the '20's, is that correct?

A. I supervised the exploring all the way through. I have always had two or three men with me that I put them out, you know, on different

(Testimony of J. J. Oberbillig.)

prospects and different places where we wanted to work to uncover ore.

Q. Now, you were doing this personally, or were you doing it for the Corporation, or what were you doing?

A. I was doing it for the Corporation.

Q. Which Corporation?

A. United Mercury Mines Company and also previous to that, the United Mercury Mines Company come subsequent to other corporations that I had in there that took over properties.

Q. Now, the Bradley Company took over in 1927, didn't it? A. Yes; 1927—in August.

Q. Now, it wasn't known as Bradley Company then, was it? A. What?

Q. It wasn't known as the Bradley Company?

A. Known as the Yellow Pine Syndicate.

Q. And then later on it became the Bradley Mining Company, is that correct?

A. Yes; it become the Bradley Mining Company after October, 1930. [65]

Q. Now, you maintain that you did developing and exploration on these—on the properties in question here, after Bradley took over in 1927?

A. Oh, yes; I carried on various properties in there. I carried on——

Q. I am talking about the Stibnite properties, Mr. Oberbillig—the Stibnite properties?

A. Yes; I have.

Q. Now, you were doing that on your own, weren't you?

(Testimony of J. J. Oberbillig.)

A. When—after Bradley had taken it over, I—under my supervision, and a good deal of it was done personally, too—I located the Midnight Group.

Q. The Midnight Group is not the Stibnite property—I don't want to interrupt you, but I want to keep to the Stibnite property.

A. That was the Stibnite property then. That was under that lease and option.

Q. That was an addition—it was off of the property, wasn't it? It was not the same tract of property?

A. It wasn't the same ore zone, you know, or ore structure, but it was another ore structure that went to the southeast. And, you see, I worked all of that, you know, and located all of that property and I also located on the main structure, going north—see, the main structure—Meadow Creek structure runs north and south and I located all those claims in there. I done all the work for patented.

Q. Now, you are talking about the Stibnite [66] property? A. Yes, sir.

Q. Mr. Oberbillig, now, I didn't object to anything this morning, but I want you to answer my questions as directly as possible, because——

A. Yes, sir; I will.

Q. This was done on a voluntary basis, as far as you were concerned, was it not?

A. It was done for my Company—my United Mercury Mines Company.

(Testimony of J. J. Oberbillig.)

Q. All right; you had no business in there after Bradley took over, did you?

A. Oh, yes; I did.

Q. What business did you have in there, after Bradley took over?

A. My business in there was to see that this property was going to—this entire enterprise was going to be a success.

Q. Now, you were in there maybe—you had the right to go in and inspect, did you not?

A. Yes, sir.

Q. You didn't have any other rights under that contract, did you?

A. Well, I—I always felt, you know, that it was my duty to assist in there and keep others—if we were making a great success of it, to keep others away from the district, you see, in getting ahold of any property that would interfere with us. [67]

Q. And when you say you were working for the enterprise, you mean you were working for Bradley?

A. I was working for the United Mercury Mines Company.

Q. Didn't you, this morning, tell us that by "enterprise," you meant the Bradley concern?

A. Well, I meant the whole thing there.

Q. Now, it is true that Bradley took over possession in 1927, did he not? A. That's true.

Q. And he operated the Stibnite properties and the claims in the tract after 1927?

A. Well, after 1927, you know, I had the ore

(Testimony of J. J. Oberbillig.)

practically all developed, and the next thing was to do was to construct the road, to get the power a-going—United Mercury located all the power sites and we put in all those power plants, all under the United——

Q. Now, Mr. Oberbillig, I don't want to cut into you, but you are going beyond my questions all the time. And you are saying "we." After 1927, isn't it true that Bradley was in there operating these properties? A. Well, do you——

Q. Bradley was the one who installed the machinery, built the buildings, put in the generating plant, is that correct? A. That is correct.

Q. In fact, they owned all of the machinery and personal [68] property located on those mines—at those mines? A. But—but I was——

Q. I don't want your thinking—now, just—I have just asked you a question—you answer it. Now, if you have got something else, your attorney will get it out later on. A. All right.

Q. Now, as far as I understand your testimony this morning, as far as your going on those properties was concerned, you were personally watching over to make sure that Bradley was doing the right thing?

A. Well, I kept pretty close watch of the property.

Q. Actually, the Petitioner, the United Mercury, operated at a loss both of these years, did they not?

A. There was nothing else for them to do except to develop ore—see that we had commercial ore.

(Testimony of J. J. Oberbillig.)

Q. You don't—

A. It was estimated that on the United Mercury property at the time when the lease was given to Bradley that there was something like three million dollars of actually blocked ore.

Q. What I am saying is, the Petitioner Corporation operated in the red in the '20's and '30's?

A. From '20 to '30?

Q. In the '20's and in the '30's? In fact, you didn't get into the profits end of this thing until the war started, did you?

A. That's absolutely true. It was a developing proposition, [69] to get ore in sight.

Q. I want to ask you questions now as to as far as your relationship with the Bradley Company is concerned—although you have been telling me some of that. It was sort of a lessor-lessee relationship from 1927 on, wasn't it? Your Company was the lessor and Bradley was the lessee, or the optionee?

A. It was the optionee.

Q. And Bradley Company was operating and working the mines in that—

A. That's right.

Q. And this has to do with the properties that are involved here, the Stibnite properties?

A. Yes; all of the properties in there.

Q. Now, that relationship changed in 1949, did it not? A. 1939.

Q. In '49? A. In '49?

Q. In '49—I'm sorry, 1941. In 1941, did the Petitioner sell the Stibnite property to Bradley?

(Testimony of J. J. Oberbillig.)

A. In 19—do you want me to explain that?

Q. Just answer yes or no to it?

A. Well—

Q. Did you deed over the properties to—deed over these mines and all that property to Bradley in 1941, pursuant to the agreement of December 31, 1941? [70]

A. I certainly did—that is, the United Mercury did.

Q. Title passed to Bradley at that time?

A. Title passed to Bradley, except—

Q. Yes?

A. —the economic interest held by me—I mean by the United Mercury.

Q. United Mercury, the Petitioner, ceased to have any interest in that property after 1941?

A. What about its economic interest?

Q. Except for the right to payment, is that correct?

A. Yes; that's correct.

Q. Thereafter, the time and manner of mining was in the sole discretion of Bradley, wasn't it?

A. That is correct.

Q. In fact, it was in the sole discretion of Bradley before 1941, wasn't it?

A. Oh, no.

Q. You never did operate those properties, did you?

A. I never took—

Q. I am talking about Stibnite?

A. I never took out any ore out of them except to throw it out on the bank—to develop ore, that is all I ever did on that property.

Q. Petitioner Corporation did not develop—did

(Testimony of J. J. Oberbillig.)

not extract any of this ore before or after the 1941 agreement, that is correct, [71] isn't it?

A. Not the—for the purpose of milling or reduction work, see?

Q. I don't want to repeat this, but Bradley furnished all the tools and the equipment, built the buildings, power plant, owned all the machinery and so on that was taking place there, is that correct?

A. I turned—when I made the deal, I turned over a lot of tools and a lot of equipment that I had in there, and all that went with him, and I even turned the pack string and everything over to him.

Q. That was in 1927? A. Yes.

Q. Now, we have stipulated paragraph six of the stipulation, and you are aware of it, that Bradley operated and worked the Stibnite properties, and extracted, transported, marketed and sold the ore, you remember that, don't you? A. Yes, sir.

Q. Now, Bradley hauled the ore to the railhead in Cascade, Idaho, isn't that right?

A. That was the railhead.

Q. That was quite a long trip, wasn't it?

A. Eighty miles.

Q. And treated the ore, getting ready—before sale—now, how did they do that in '44? [72]

A. In 1944? The tungsten was mined and put in the reduction plant, which was a wonderful plant at that time.

Q. Was that right there on the——

A. On the grounds.

(Testimony of J. J. Oberbillig.)

Q. —on the property—that was Bradley's reduction plant?

A. Yes. Then that ore was turned into a concentrate; then the concentrates were hauled to Cascade or directly on to Boise to the purification plant.

Q. Now, Bradley did all of this, did he not?

A. That's very——

Q. It got the purchasers, it extracted the ore for sale, it did everything in connection with mining—with the operations of these properties—of these mines on the properties?

A. Yes, sir.

Q. Now, I want to ask you some questions about the Bradley Mining Company. You were quite familiar with the set-up there, weren't you?

A. Very familiar with it.

Q. It was a California concern?

A. Yes, sir.

Q. Do you know something about its financial background?

A. I know that in 19—right along around 1941, they were very hard up.

Q. It was a large company, wasn't it?

A. Quite large. [73]

Q. It was a multi-millionaire—multi-million dollar corporation?

A. I hardly think so.

Q. Do you know—whether they had spent a lot of money—invested money in the mines there on the Stibnite properties?

A. They had spent a considerable sum along, as they went from '27 up to '41.

(Testimony of J. J. Oberbillig.)

Q. Would you say they spent about five million dollars in developing that property?

A. No; oh, no. No. In the development of the property, and in the actual disclosing of ore, I doubt whether they spent as much money as I did for the United Mercury, up to that time, now, see?

Q. Now, you just answer my questions. You are always going a little beyond them, but I will bear with you if you will bear with me. They had quite a few million dollars invested in property though, did they not?

A. When the '41 contract was made, we, all of us knew that they were very hard up, so I——

Q. They had been through the '30's, had they not?

A. They didn't have as much money as a lot of them probably thought they did.

Q. Actually, Mr. Oberbillig, it took a pretty big outfit to try to mine anything in that area, as I understand your testimony this morning? [74]

A. Well, then I must have had a pretty big outfit, too, then.

Q. All right; I am asking you, isn't that the reason why you didn't operate these properties?

A. I had—it cost me money to operate there.

Q. I understand—you didn't operate these properties because you didn't have the capital to do it?

A. I—the only thing I could do with those was to disclose ore.

Q. Now, you still maintain that United—United

(Testimony of J. J. Oberbillig.)

Mercury, the Petitioners, spent large sums in developing the Stibnite property?

A. You mean the Bradley?

Q. Bradley properties, yes.

A. Yes. Well, they had a considerable money—they had to spend a considerable money in the way of water power, building of roads—there wasn't any roads in there all the while I developed it, and no power whatever. And there was two little power plants in——

Q. I mean, if Petitioner spent any money in there, it was done before 1927, wasn't it?

A. It was a what?

Q. If you spent any money developing those properties, it was done before 1927?

A. Some of it was.

Q. Most of it?

A. Well, the biggest part, yes. [75]

Q. In fact, all of it was done before 1927, wasn't it?

A. Oh, no; I had done a lot of work on Antimony Ridge; I done a lot of work on—on the Smokey Ridge; I done a lot of work on the Sun (phonetic) Group. Bradley never even drove a pick in on that and he had the option on it.

Q. Actually, it was too expensive to operate the property for the Petitioner, and that is the reason why you had Bradley take it over, isn't that right?

A. Well, you know, it is customary after you get a mine developed, you have——

Q. I mean—I just want you to answer yes or no

(Testimony of J. J. Oberbillig.)

on that. That's the reason why you turned it over to Bradley, wasn't it?

A. Because I did not have sufficient money, and that is the position that Bradley was in in '41, and I told Mr. Bradley when I made that deal, that "I'll go with you and I'll give you a deed to the property so you can raise some money so we can get this property going now. We got tungsten here, and we need it." Isn't that correct?

Q. I don't know if it is correct. You are the one that is testifying.

A. No; no, is that what you wanted me to say?

Q. No; I just want you to answer my question, if you please. Some of these remarks are going beyond my questions. I am interested in that statement you made this morning about how much you did pay in the way of development expenses. What did you say [76] you paid in the way of development expenses—I am talking about the Petitioner?

A. The property and the development work—for me to make a true statement, must have run around seven to eight hundred thousand dollars.

Q. How much?

A. Over seven or eight hundred thousand dollars.

Q. Where did you get the money?

A. Where did I get the money? Some of it out of the ground. I spent money that Bradley paid.

Q. Now, you operated at a loss all throughout those years, the '20's and the '30's——

A. Sure, but we had——

(Testimony of J. J. Oberbillig.)

Q. —and you had everything spent in 1922?

A. We had no production.

Q. Well, I mean you did have it all spent in 1922, did you not? A. In 1922?

Q. That's correct.

A. Oh, well, I am speaking about all the way through until now.

Q. What I am speaking about is how you got the money to throw into these properties in the '20's and '30's, as you have been testifying. Now, do you agree with me, do you, that you didn't have any money at all by 1927? [77]

A. In 1927, I owed around thirty thousand dollars.

Q. I am not talking about you, personally. I'm sorry—I mean Petitioner?

A. I'm talking about Petitioner, too. I always get myself mixed up into that.

Q. Now, isn't it true that all of the money that you had raised by selling stock in the Corporation had been invested by 1922?

A. Not by 1922, but it was by 19—by 1927.

Q. It was invested by that time?

A. Oh, yes.

Mr. Picco: Well, I will put this in for what it's worth. I don't know how we are going to do this, your Honor. I think we can get what I want in there. I think it might be a good idea to just identify this as Respondent's Exhibit for Identification, but I am not going to turn it in—I am not going to offer it now.

(Testimony of J. J. Oberbillig.)

The Court: Very well. What is that, a book—do you want to describe the whole book?

Mr. Picco: These are the corporate records—the corporate minutes of the Petitioner here.

The Court: Mark the book.

Mr. Picco: I will not offer this in evidence because we——

The Court: You will read certain pages, is that it?

Mr. Picco: That's correct.

The Court: Very well. [78]

The Clerk: Exhibit F for identification.

(Respondent's Exhibit F, Witness Oberbillig, marked for identification.)

Q. Now, I show you Exhibit F for identification, which are the corporate minutes of the Petitioner, and I particularly direct your attention to the corporate minutes of December 14, 1922—the minutes of the Board of Directors, on page a hundred and eighty of the corporate minutes book, and that purports to be a financial statement of United Mercury Mines at the close of business on November 4, 1922, is that correct?

A. That would be correct, sir.

Q. Now, looking down over the assets, you have how much in the way of assets here?

A. That is—I can't see that there.

Q. One million one hundred and forty-two thousand nine hundred and eight dollars?

A. Yes.

(Testimony of J. J. Oberbillig.)

Q. Now, you look at your liabilities side of this balance sheet and you will find that all of this is—all of these assets reflect the capital stock and the surplus, is that correct? A. That's correct.

Q. Now, you never got any other money except what you had in here in the way of capital stock in selling it, isn't that right?

A. Up to that time.

Q. That's right. Now, you had invested all that money by [79] 1922, wasn't it?

A. Well, this was, yes, by 1922.

Q. Now, in looking over this balance sheet, it shows that you have invested in various mines. Now, did you have stock in those mines?

A. These were twelve companies—twelve companies that were organized previous to the United Mercury Mines Company and when these books were audited, these figures were taken there, on that, and I think that these stocks and everything were figured at the par value and put down here on that basis.

Q. The balance sheet shows that you had a cash balance of two thousand one hundred and fourteen dollars and forty-three cents at the end of 1922?

A. That's when—that's when United Mercury took over all these properties.

Q. Yes.

A. These properties were all turned and that is the reason that the United Mercury then incorporated, to take over all of these properties, and it took over all the—and I suppose that is about the

(Testimony of J. J. Oberbillig.)

only thing, when they balanced out that account, the only thing they could do.

Q. Well, actually, what I want you to answer is that by 1922, you had actually spent all the money in that Corporation, and you had all these various mining claims throughout Valley County, Idaho, didn't you? [80]

A. Oh, no; I had quite a few mining claims, that's a cinch.

Q. You didn't have any other cash for developing in 1922, did you?

A. Nothing any further than what I could raise by the sale of stock, but after 1922, I raised considerable money selling stock.

Q. How much did you raise?

A. Well, I went to Oregon and got some people interested there, who put up about eighty thousand dollars in stock—in money, that is United Mercury Mines and by along about 1924, '25, I had around four—three, four hundred thousand dollars invested—I mean, invested in these properties.

Q. Now, as you went along in the '20's there, what—1926, 1927, you found it advisable to sell all or part of your mining claims, because you didn't have enough to operate, isn't that right?

A. That is true. Because, I will tell you, you know, those things are done in a mining way—people will go out—you probably would be glad to go out if you thought you could locate a mining claim, and do a little work on it, and then have somebody come in and buy it off of you.

(Testimony of J. J. Oberbillig.)

Q. I don't question that at all. I believe that. Now, what——

A. That is just where I was.

Q. In other words, you were looking around for somebody to go in and operate these properties and to develop these properties for you? [81]

A. I would be happy had I the money to have gone ahead with that, and I would have been very happy to have gone ahead after we struck the tungsten.

Q. Actually, by looking through the books, you find that you had unsuccessful negotiations trying to sell to the Hexma (phonetic) Mining Company—you remember that, don't you?

A. That was one of the companies, yes.

Q. You actually ended up doing business with Bradley in 1927? Your negotiations to transfer these properties and have them operated were successful with Bradley in 1927?

A. Ever since Bradley has taken over the property, there has never been any negotiations carried on with any other company except with the Bradleys.

Q. Now, as a matter of fact, the development of the Stibnite properties was made by Bradley, wasn't it? A. On the Stibnite property?

Q. That is correct.

A. Why, man, I had——

Q. I am just asking the question. You can say no if that is the answer.

A. All right, no; Bradley didn't do it all.

(Testimony of J. J. Oberbillig.)

Q. Wasn't it—didn't Petitioner acknowledge or in some of the stockholders' meetings, from time to time, from 1927 to 1941, and even in the agreement, that the Stibnite properties were to be developed by Bradley? [82]

A. He was to spend so much money to keep up the work, and now, when you come to that, if you went me to explain that, they had the Cinnabar Group and, of course, at that time, Bradley didn't have any too much money, so he asked me to go down to where the tungsten strike was made and lay out the work so that the assessment work could be done on the Cinnabar Group, and to lay it out so that it could be done on the Monday and Meadow Creek Group, which was a mile and seven-tenths, you see, before you got to Meadow Creek.

Q. Now, you did this personally, but you didn't spend a dime of your money in doing that, did you?

A. I done it for Mr. Bradley—I done it for United Mercury Mines Company—done it for the enterprise.

Q. Actually, in the 1927 agreement, you obligated Bradley to spend twenty-four thousand dollars every year in developing those properties?

A. That's true.

Q. And they spent twenty-four thousand dollars every year from 1927 on through to 1939 and to '41—in fact—is that correct?

A. That's correct.

Q. In fact, in the 1939 agreement, didn't you obligate him to spend twenty-five thousand dollars a year?

(Testimony of J. J. Oberbillig.)

A. That's true, but I want to tell you now, Mr. Bradley spent at least a hundred thousand dollars a year from '27 to '33. He exceeded the amount of his contract. [83]

Q. In fact, the purpose of giving the options to Mr. Bradley and his corporation from 1927 on, was to actually cause the development of those properties?

A. It was to get those properties into production. They were practically developed.

Q. Well, I want to refer you again to—I don't think we are on this one at this time—let's identify this as the next number for the Respondent.

The Clerk: Exhibit G for identification.

(Respondent's Exhibit G, Witness Oberbillig, marked for identification.)

Q. I want to hand you Respondent's Exhibit G for identification (hesitating)——

The Court: Somebody should tell the Court what that is.

Mr. Picco: I am going to get to that in a second, your Honor.

Q. Now, this Respondent's Exhibit G purports to be a continuation of the corporate minutes of the Petitioner. that's correct, isn't it?

A. That's correct; yes, sir.

Q. And it is that? A. Yes.

Q. Now, I want to direct your special attention to the corporate minutes of January 13, 1943—that involves a meeting of [84] the Board of Directors—

(Testimony of J. J. Oberbillig.)

if you would just verify that that is correct, as we are going to be dealing with this record. I am sorry I can't present this entire exhibit, as it is too bulky.

A. This is an annual stockholders' meeting, is that what you wanted?

Q. That's correct. It is January 12, 1943, isn't it?

A. Yes, sir.

Q. Now, I want to go along here and point out one statement made in here in the way of a resolution. I want to read it so it will get into the record.

A. All right.

Q. This resolution states—this corporate minutes of January 12, 1943, which is Respondent's Exhibit G for identification reads in part as follows—this is a part of the resolution: "Whereas, the United Mercury Mines Company, since the year 1927, has had certain of its properties under an option to Fred W. Bradley and corporation organized by him, and the purpose of giving that option was to cause a development of the claims described therein for the purpose of paying to the stockholders, their investments in said United Mercury Mines Company." That's correct, isn't it?

A. That is true; yes, sir.

Q. So that actually the reason why these properties were transferred—the Stibnite properties were transferred to Bradley was to cause the development of the properties? Is that correct?

A. That's correct, yes; and to take care of the assessment work. [85]

Q. Now, I am going to ask a question about the

(Testimony of J. J. Oberbillig.)

mineral explorations on the Stibnite after 1941. Did you mean to claim credit this morning in your testimony, for finding tungsten ore on the Stibnite property—is that the impression you want to leave with the Court?

A. What date is that you got there?

Q. I don't know what page it is on—I am talking about your testimony this morning.

A. I know, but didn't I give some date there, or didn't he ask me——

Q. I think it was around—1941 or '42.

A. Well, in 1941, it was through my work that the tungsten was discovered and where that tungsten lied on that property, there never would have been a Stibnite today had it not been for the efforts of the United Mercury Mines Company to persuade the Government to go in there and drill the property for strategic minerals.

Q. Did you spend any money in connection with that?

A. I certainly spent quite a little money in connection with that.

Q. Did the Petitioner spend any money?

A. What's that?

Q. The Petitioner?

A. The Petitioner, yes, sir.

Q. At that time, Bradley was in possession of the Stibnite properties, wasn't he—wasn't the Bradley Company in possession of [86] the property?

A. After I—after I got the Hennessey property

(Testimony of J. J. Oberbillig.)

for him and got it back to him, and got it back into the enterprise—into the Bradley enterprise. That's when they spent the money on it.

Q. It belonged to them or you wouldn't have been giving it to them, isn't that right?

A. Oh, let me tell you—they threw it back to Hennessey and I purchased it from Hennessey.

Q. Do you want this Court to believe that you had millions of dollars in tungsten in your pocket and you turned it over to Bradley because you were kind-hearted?

A. Absolutely true, and I want to make that statement. That was my—that was the only ambition I had at that time, to see a success in that country.

Q. Now, Exhibit 9—this is the agreement which permitted the Bureau of Mines to come into the picture. Now, the Bureau of Mines did this for nothing, did it? It didn't charge anybody anything to go in there and drill. They were thinking about the United States, I take it, at that time, and the possibility of war, isn't that it?

A. So was I.

Q. And so was Bradley?

A. No; Bradley didn't give it a thought. Bradley would have run us all off if he had a chance.

Q. Well, I don't understand, really, and if you have the answer to it, I'd like it—I think you did answer it. If Bradley was—if [87] Bradley Mining Company was as bad as all that, why you turned over this tungsten that you found there at that time? You don't have an answer?

(Testimony of J. J. Oberbillig.)

A. I told Mr. Bradley—one of his attorneys, and he says, “Well,” he says, “I appreciate all that.” “Well,” I says, “I’d rather deal with the Devil I know than the Devil I don’t know.”

Q. Actually—I direct your attention to the Petitioner’s Exhibit 9, which is the agreement with the Bureau of Mines for a minerals explorations.

A. This was the second one that they made out.

Q. This was signed by United Mercury, by yourself?

A. And Bradley.

Q. And by Bradley. Now, the signature of Bradley was absolutely necessary on this thing, is that correct?

A. Well, in order to permit him to let us drill. It wasn’t——

Q. You want the Court to believe that Bradley was against this thing—he was against finding tungsten on this——

A. Yes, and I have——

Mr. Carver: I don’t like to interrupt counsel, but I don’t think it is proper cross-examination to ask this witness what he wants the Court to believe. We are trying to get at the facts.

The Court: Well, this is cross-examination. He has a good deal of leeway in the examination of this witness, and the witness either doesn’t understand or seems reluctant to answer. [88] Let’s speak right out and tell the Court about this, if you understand what he means.

A. I do understand what it means. It was in 1940 when the Government moved over there to drill the Hennessey Group, and Bradley objected to it,

(Testimony of J. J. Oberbillig.)

so they went over to another property that was owned under my supervision. That was what we called the Sugar Creek Group, and they drilled there that year and finally, by 1941, we got him in the notion of drilling, because we opened up—went through a lot of ore and found that the drilling was really an essential thing to discover and develop ore.

The Court: Then it was necessary to get his signature before you could drill on his property then?

A. What's that?

The Court: He had to sign this agreement before you could drill on this property?

A. Oh, yes.

Q. Now, I ask another question. You stated this morning that the discovery of this tungsten deposit occurred some time in October of 1941, is that correct?

A. No; I said in July or August.

Q. Oh, yes. Now, I am anxious—I would like to get—I would like to ask this question: Were they sure that they had tungsten discovered in August of 1941, before this agreement was signed? Before the agreement that is Exhibit 4 in this case?

A. What is the date of that? That was '41? [89]

Q. This was thirty—September of '39, this thing here.

A. Huh?

Q. September, '39.

A. Yes; that is when we first started out and it was signed though, a year after that, by Bradley.

Q. You testified this morning there was bad re-

(Testimony of J. J. Oberbillig.)

lationship between the Petitioner and Bradley Mining Company. In fact, you—did you not testify that way this morning?

A. Not that it was bad relationship, but I testified that Bradley closed up the Meadow Creek Mine, and he had no right to close it down except to beat that fellow out of his royalties that went to work and put that field on its feet.

Q. Petitioner was trying to forfeit this agreement at this—at that time?

A. Well, if Bradley hadn't gone to work and hadn't gone down on the East Fork deposit, that is the Hennessey Group, we certainly would have done something, and he understood that, too.

Q. At any rate, on December 31, 1942, Petitioner deeded over its property to the Bradleys?

A. That's true.

Q. Now——

Mr. Carver: '41, you mean?

Q. '41? A. '41.

Q. I say, could you not have been mistaken about the [90] discovery of tungsten deposits on that property and wasn't the discovery actually in 1942? A. No; the discovery was in '41.

Q. Then you——

A. Now, I will make that clear.

Q. That won't be necessary. You have answered my question. You want your answer to stay that you turned over this tungsten to Bradley Mining Company? A. I sure do.

Q. I want to try to get into your testimony of

(Testimony of J. J. Oberbillig.)

this morning as to transportation—transportation costs. I am not so sure that I received what you had in mind. Did you testify that you shared in the transportation costs—was that the essence of your testimony this morning, or were you testifying that you participated in the transportation of the ore to market in 1944?

A. I participated in the transportation and paid my—I paid in excess of my economic interest.

Q. That is what you meant—that was the impression you meant to carry this morning?

A. That's right.

Q. Now, actually you have nothing to do with the transportation of that ore, did you?

A. Not—nothing that I know of, no.

Q. Neither you nor the Petitioner—you didn't perform any service whatsoever in connection with transportation, did you? [91]

A. Except to allow him to make the charges for that transportation.

Q. As far as transportation, that was Bradley's affair, wasn't it?

A. I don't—I know, but not the charges of it. He had no—

Q. Answer my question.

A. Oh, yes; that's correct.

Q. And as far as—as to whom he transported, that was his business? Now, what I am trying to say, you didn't have any right to tell him anything about transportation, did you?

A. Why not didn't I?

(Testimony of J. J. Oberbillig.)

Q. I am asking you that question.

A. Yes; I did.

Q. What right did you have to tell him anything?

A. He was violating the contract when he charged me and took those out of my royalties. Why, he charged me even for the amortization of the plant. It is right there on those statements.

Q. You are wanting to say that Bradley was forcing something down your neck in violation of that contract?

A. Certainly he was, at the time when he was making those charges.

Q. Now, the contract called for your sharing in some of those expenses?

A. That was in the two dollars and a half. He worked that out [92] of me, too.

Q. He didn't work it out of you. You signed the agreement, didn't you?

A. Sure I did, after we agreed to that.

Q. You want the Court to believe that there was no modification of that agreement from two dollars and fifty cents to five dollars?

A. I would like to have the Court believe that I yielded there to pay that two dollars and a half.

Q. You didn't have to——

A. In order to keep things going.

Q. All right, you did that out of the generosity of your heart?

A. I did that for my Company.

(Testimony of J. J. Oberbillig.)

Q. I understand that Petitioner was paid five per cent of the net revenue?

A. The contract said five per cent of the gross.

Q. Five per cent of the returns?

A. Of the net smelter returns.

Q. Now, actually, isn't it true that you were sharing part of the cost of all this operation—if you were just getting five per cent of the net return?

A. I was sharing a great deal of it right along.

Q. But you are not contending, are you, that you were participating in the operation?

A. What would that be, if it wasn't operating—if it wasn't participating in the operation? [93]

Q. Well, I am saying it to you. You have got to answer.

A. Wouldn't that be clear enough, if I was paying for hauling out ore and paying for reduction of the ore? That all comes under the head of general mining, doesn't it?

Q. Are you asking me questions? A. No.

Q. It's true that you were sharing part of the cost of transporting the ore pursuant to the contract—that's correct, isn't it?

A. That's correct.

Q. But it is not true that you had anything to say about how that ore was transported?

A. Well, now, I think I had a right to put in a kick there just the same.

Q. Well, I want to take you now to the—your sharing in the cost of the treatment process. Will

(Testimony of J. J. Oberbillig.)

you please tell us again what you meant by that? You testified about the treatment process. Was that in 1944? A. That was in 1944.

Q. Now, how was that done? Will you explain the process there? A. Yes; the——

Q. Bradley installed or erected a plant in Boise, Idaho, is that right?

A. Yes; it was a leaching plant; they called it a purification [94] plant. That was to upgrade the tungsten concentrate so that they—now, the more tungsten that you could get in—higher grade content, you see, the more you would get out, or a better price you would get. It——

Q. That was part of the cleaning process. You cleaned that ore and make it a little better, and that is just part of sales, isn't that correct, too——

A. To make it more salable.

Q. Now, you testified that you shared in the cost of the cleaning process? A. Yes, sir.

Q. Now, that was pursuant to contract, too, wasn't it?

A. That was in violation of the contract, because the contract didn't make any such statement.

Q. Now, you didn't mean to imply that you were participating in the cleaning operation, were you, this morning?

A. Whenever—yes—whenever I had to pay that share, and I yielded to him—I says, "All right, I'll go with you," and he promised that when the tungsten was depleted, which the drill bit, you know, would show that the tungsten would soon be mined

(Testimony of J. J. Oberbillig.)

out, and we had made a good enough showing to put in a two thousand ton plant, and he says, "We're going to put it in." Now, the records will show that he went ahead on that, and we had the two thousand ton plant.

Q. You don't want to leave the impression that anybody but [95] Bradley conducted the cleaning process in Boise, Idaho?

A. It was only Bradley that conducted that.

Q. All right; I think we understand each other. Now, I want to go over your testimony as to the construction of some road in the area. I think you said 1943 or 1944, is that correct?

A. What is the royalties about?

Q. The road; the road.

A. Oh, the road? Well, that road was to assist the Idaho Power. Equipment was very scare at that time, and I had the two large D8 Cats—Caterpillars. Now, I took them over after I had finished all the work—get the line in for the Cinnabar Mines from Bradley, and here we were stuck then for power, if this work hadn't been done between Meadow Creek and the Johnson Creek, where the power-line came, and I put my two Cats on there and run there for nearly six weeks. And I never charged—

Q. Now, was this in '43 or '44?

A. That is—huh?

Q. 1944 or '43?

A. That is the fall of '43, when we got the power in.

(Testimony of J. J. Oberbillig.)

Q. Now, are you—were you saying this morning that this road was for the particular benefit of Bradley?

A. That was absolutely for the particular benefit of Bradley and the Cinnabar Group.

Q. You want the Court to believe, do you, that again Petitioner is coming into the picture and helping Bradley out with its [96] own affairs, is that it?

A. That's true.

Q. Weren't you operating at the same time?

A. What's that?

Q. At this time, weren't you operating on another tract?

A. I was operating on the—I had a—we were co-partners in the Cinnabar Group.

Q. That is the Bonanza—

A. The Bonanza Group, yes.

Q. You were also operating the—

A. Antimony Ridge.

Q. Antimony Ridge? A. Yes.

Q. Now, this road that was being constructed for Idaho Power—wasn't that of some particular benefit to your own operations on those two tracts of land?

A. Why, sure, it had something, because we wanted the power at Cinnabar, too.

Q. And isn't that the reason why you were in there with your two Cats?

A. No; because I was co-operating to get that power in there.

Q. Now, as a matter of fact, Bradley was in there co-operating, too, on this thing, wasn't he?

(Testimony of J. J. Oberbillig.)

A. Well, yes, but he didn't have any equipment.

Q. You mean that Bradley didn't have any [97] equipment?

A. No equipment to put on that road. That is absolutely true.

Q. Now, you incurred some expenses in connection with that, did you not? A. The what?

Q. You incurred some expenses in connection with these Cats? In connection with improving the road or whatever you were doing for Idaho Power?

A. My drivers that was driving on the Cats boarded there at Bradley, and——

Q. Bradley was giving them board and room?

A. Yes, he was—wait a minute, now. They boarded there and after we had the road and had the power in and everything, Mr. Bradley sent me a bill. I think it was for something like a hundred and sixty dollars for the board for those men, and I handed it over to my alleged lawyer, that was Mr. Worthwine (phonetic), and he said, "Give me that bill," he says, and he took the bill, and that is the last I heard of it.

Q. You never paid anything?

A. That's co-operation, you know.

Q. You never paid anything? A. Huh?

Q. You didn't incur any expenses actually, did you, in connection with this road?

A. We, the United Mercury, paid it all. [98]

Q. I am saying—how did you pay it?

A. How?

(Testimony of J. J. Oberbillig.)

Q. That's right.

A. I paid the bills for the United Mercury.

Q. How did you deduct it—did you deduct it in Petitioner's income tax return?

A. I don't remember. I don't know about that.

Q. Now, could I have the Deficiency Notice? (Paper handed.) Now, I direct your attention to the Deficiency Notice on file in this proceedings, page two of that Deficiency Notice, and I want to read one of the adjustments that were made here (reading): "Loss claimed on Antimony Ridge operation is decreased in the amount of two thousand five hundred dollars to disallow construction of road for Idaho Power Company line." This is for 1944. Now, could this be what you are referring to?

A. No; that work was done in '43.

Q. What work was that—what work was done in 1944 for Idaho Power Company?

A. I don't recall of any that was done in—

Q. Well, then, it is conceivable that this—

A. This—the auditors must have taken this one and got mixed up on that, because in '44, I done a lot of work on Smokey Ridge and Sun Group, and Bradley had an option on them at that time.

Q. And what you are saying is that it was probably '43, but the expenses were taken in 1944? [99]

A. Well, I wouldn't know about that.

Q. Now, actually, there were expenses taken in connection with Idaho Power Company line—but you took that in connection with the Antimony

(Testimony of J. J. Oberbillig.)

Ridge operation. What I am saying—this line—this road benefitted the Antimony Ridge operation, did it not?

A. No; no, I am getting power put in now for Antimony Ridge, and that power is three-quarters of a mile from there.

Q. Would you please explain to the Court why you claimed two thousand five hundred dollars in connection with a loss on the Antimony Ridge property for that very same thing in 1944?

A. I have to confess that I don't understand; I don't know anything about that.

Q. Do you know whether you took that deduction in the income tax returns for 1943?

A. I'll tell you where that charge might be made on account of Antimony Ridge. That's the road that I constructed from Johnson Creek, up the Golden Gate Group, which is a part of the Antimony Ridge Group, and that is the place where I recent—after Bradley turned back the property, I recently made a big strike up there for tungsten.

Q. Well, if you had incurred an expense in connection with this road in 1943, you would have taken the deduction in the income tax return, is that correct?

A. Well, I think so.

Q. Now, in what connection would you have taken that, as to [100] the income you received from Bradley?

A. It would have to come from there.

Mr. Picco: I want you to mark this Respondent's Exhibit—

(Testimony of J. J. Oberbillig.)

The Clerk: H for identification.

(Respondent's H, Witness Oberbillig, marked for identification.)

Q. I hand you Respondent's Exhibit H for identification, which purports to be the petitioner's corporation income tax return for 1943, and ask you if that is your signature at the bottom?

A. That is my signature.

Q. And what is this document?

A. Well, I just couldn't tell you. I think that is the——

Q. That's the return for 1943, isn't it?

A. 1943—the return for 1943—they make those things out and I sign them.

Mr. Picco: Are you willing to stipulate that the money that was incurred in connection with the road for the Idaho Power Company was incurred in connection with the operation of Antimony Ridge?

Mr. Carver: No; I am not willing to do that. I am willing to stipulate that that twenty-five hundred dollars is this road work.

Mr. Picco: I'm not going to stipulate that. I offer this [101] in evidence, your Honor.

Mr. Carver: To which we object. I don't see the relevancy. I don't understand at this time what counsel is getting at.

Mr. Picco: He tells me that he incurred some expense and he probably took it off on his income tax return, and I want him to look at this income tax return and tell me where he took it. If he did

(Testimony of J. J. Oberbillig.)

take it. In other words, if he made——

The Court: To be sure of whether or not it was taken in '43?

Mr. Picco: That's correct.

Mr. Carver: I don't think there is any question, counsel, but what that item occurs in this '44 return.

Mr. Picco: Which item?

Mr. Carver: The twenty-five hundred dollars.

Mr. Picco. That is in connection with Antimony Ridge. You have no objection, do you, Mr. Carver?

Mr. Carver: I have no objection.

Mr. Picco: I move this into evidence.

The Court: Very well, Respondent's Exhibit—what is the exhibit number?

The Clerk: H.

The Court: Respondent's Exhibit H is received in evidence. Do you desire leave to withdraw the original and substitute photostatic copy?

Mr. Picco: Yes, if you please. [102]

The Court: Leave is given to withdraw the original and substitute photostatic copy therefor.

(Whereupon, Respondent's Exhibit H for identification, Witness Oberbillig, was received in evidence.)

Q. Thank you. Mr. Oberbillig, I appreciate that you are not too familiar with this, but this is the Respondent's Exhibit H, which is the 1943 return of the Corporation, and I just want to point out one or two things here and then ask you questions—now.

(Testimony of J. J. Oberbillig.)

there is a schedule here, an analysis of your expenses in connection with the operation of the Bonanza Mine—you were operating at that time on that, joint operation with Bonanza?

A. That's right.

Q. You have got "road maintenance." Could you have meant that when you mentioned about the expenses you incurred in connection with the operation of the road in the fall of 1943? If you don't know, just say you don't know.

A. I was just trying to think, you know. In the wintertime, we have to spend a considerable money, you know, and that year, we had some very heavy snows, and I had to send my Cat all the way through from Johnson Creek, you see, way up to Bonanza, and we worked on that.

Q. Sure.

A. Now, the same way happened this year, you know. We had, during the first of the year, had a big freshet, and we had to take care of that road. Nobody would take care of it, and I spent, [103] with two men and one of my Cats, we spent fourteen days this winter season.

Q. The answer is that you don't know whether that expense was thrown into road maintenance for the Bonanza operation?

A. I couldn't, you know—I couldn't——

Q. Now, I have just——

A. ——I think that that was—is that for Bonanza?

Q. That's for Bonanza, yes.

(Testimony of J. J. Oberbillig.)

A. Well, I think that that is absolutely true, working on the road there.

Q. Now, the road in connection with the Idaho Power Company? A. No.

Q. Something else?

A. That would be the road going to Bonanza.

Q. Now, there—here is Antimony Ridge—an analysis of the income expenses there, and you have, as one of the expenses, “Cat, car and truck expense, four thousand seven hundred and sixty-seven dollars and eight-five cents.” Could that have been the expense you were talking about?

A. That’s ’43, isn’t it?

Q. That’s ’43, yes. Can you see that all right?

A. Yes, I was taking out——

Q. It is your third item?

A. Yes; I was taking out quite a lot of—oh, well, the Cats that year worked right through all winter on that, you know, and [104] all summer on Antimony Ridge, you know.

Q. Was that in connection with the road for Idaho Power Company?

A. No; that was in connection with taking out ore.

Q. Now, you didn’t take that deduction in connection with the Stibnite property—the royalty income you received?

A. Was that taken in connection with the Stibnite property?

Q. No; I am asking you—you didn’t take it on this return?

(Testimony of J. J. Oberbillig.)

A. Oh, no—no, because I was taking ore on Antimony Ridge that year.

Q. You just didn't take the expense at all on the return, is that right?

A. Well, I don't know how those fellows worked it.

The Court: You are offering that in evidence. It has already been offered?

Mr. Picco: Yes, I have, your Honor. Yes, thank you.

The Court: And leave was given to withdraw it and substitute photostatic copy?

Mr. Picco: Thank you, very kindly.

The Court: Very well.

Q. You mentioned that certain property taxes—or, not—it wasn't a property tax—mining license tax was based on Petitioner's five per cent interest? Didn't you mention something about that at the very end of your testimony?

A. We have to pay a mining tax. Now, I am sure of that, [105] now, I am not too familiar with that——

Q. That is under the Idaho law, is that correct?

A. We pay a mining tax for all our income, you know, that we get in—net income—I think it's the net income, and we pay that and I have been paying that right along.

Q. Now, do you know whether that mining license has to do with actual mining of the property which you are mining, like Antimony Ridge?

A. No; I wouldn't know.

(Testimony of J. J. Oberbillig.)

Q. You wouldn't know. I have just one or two more questions. I want to touch very briefly on the Bonanza and the Antimony Ridge properties. It was stipulated quite a bit. Now, the location of those properties—they are—how far away are they from the Stibnite properties?

A. You mean Antimony Ridge from the Stibnite property? Twenty miles by road.

Q. And the Cinnabar properties—that's—

A. That's the one.

Q. That's operated jointly, isn't it—Petitioner and Bonanza operate that one jointly?

A. Well, the Bonanza, you know—the Bonanza was the Cinnabar—

Q. Yes.

A. —as far as the Hermes Group, you see.

Q. Now, that is twenty miles away from [106] Stibnite?

A. From—oh, no; it joints Stibnite on the east.

Q. Antimony Ridge is twenty miles away?

A. Antimony Ridge is twenty miles away. And there is where every winter we have had a lot of snow removal on that road, you know.

Q. Your mining operations on these two tracts of land were on a limited scale, weren't they?

A. They were what?

Q. On a limited scale. A. Oh, yes.

Q. They were worked and operated by the Petitioner? A. Yes.

Q. I want to touch very briefly on Exhibit 10, the valuation report. I hand you Petitioner's Ex-

(Testimony of J. J. Oberbillig.)

hibit 10, which is this controverted valuation report, and I ask you, do you know of your own knowledge anything about the contents of this?

A. Oh, I know about it. We went to Salt Lake, and Mr. Carr and Mr. Martella (phonetic) were in the office there with myself and Mr.—and we agreed on that stuff. They said—Mr. Carr fixed it up—he said, “I’ll fix that up for you so that it would be all right.”

Q. You——

A. And Mr. Middleton (phonetic), he—I am not familiar, you know. I am not in that line of work.

Q. Now, were you people talking about the replacement value [107] of these mining claims? In this report? A. I wouldn’t know.

Q. You wouldn’t know? A. No.

Mr. Picco: Your witness.

Mr. Carver: If the Court please, I believe it would expedite the matter just a little if we could have perhaps a very brief recess to confer.

The Court: Very well, we will recess for ten minutes.

(Whereupon, a recess was taken at 3:10 o’clock p.m. until 3:30 o’clock p.m., at which time the hearing reconvened, with the parties heretofore mentioned being present.)

The Court: Very well, gentlemen. You may proceed.

The Clerk: Exhibit 13 for identification.

(Petitioner’s Exhibit 13, Witness Oberbillig, was marked for identification.)

(Testimony of J. J. Oberbillig.)

Redirect Examination

By Mr. Carver:

Q. Mr. Oberbillig, counsel has brought up the matter of your relationship, that, in particular your motives, purposes, in working on this tungsten strike in the Hennessey Group. I will hand you Petitioner's Exhibit 13 for identification and ask you to state what that is? (Exhibit handed.)

A. That is a letter from Mr. P. R. Bradley, who was the brother of Mr. W. F. Bradley, and the uncle to John Bradley, who [108] was Executive Vice President of Bradley Mining Company. This is the uncle to him.

Q. What is the date of that letter?

A. The date of this letter is June 8, 1944.

Q. Now, do you have the original of that letter?

A. Yes, indeed, I have.

Q. Where is it?

A. It is in Boise, in the files. In fact, it is in Boise, in the bank box.

Mr. Carver: If the Court please——

The Court: Is that Bradley an officer of the Bradley Company, or is he a person in authority?

A. He was in absolute authority at the time.

Mr. Carver: If the Court please, I would like to offer this Exhibit into evidence, with leave, if counsel will agree, that we may substitute the original. By inadvertence, we did not bring it with us. Counsel has seen it. Perhaps it would be agreeable if we were to exhibit the original to counsel and have it

(Testimony of J. J. Oberbillig.)

agreed then that this would be admitted at that time as a true copy?

Mr. Picco: The substitution of the original won't be necessary. I have seen it somewhere. I was wondering whether you would go into it a little more and find out just what some of that—develop what it is, it might be better.

Mr. Carver: If the Court please, in order that my questions may be clear, I will ask leave to read the exhibit. [109]

Mr. Picco: Are you going to read the entire exhibit?

Mr. Carver: Well, perhaps I——

Mr. Picco: I would prefer you wouldn't.

Mr. Carver: I can show it to the Judge and then ask him questions on it. (Exhibit handed.)

Q. Now, this letter, Exhibit 13 for identification, which we are offering into evidence, Mr. Oberbillig, refers to the Hennessey property. Is that the property upon which the strike was made by the drilling which resulted in the—— A. Yes, sir.

Q. This letter from Mr. P. R. Bradley was in connection with your activities in seeing the values in that property, is that correct?

A. That's true.

Q. And this was a recognition from the Bradley Mining Company that you were the one that had foreseen the qualities of that particular piece of property? A. Yes, sir.

Mr. Carver: I offer this into evidence.

Mr. Picco: I don't have any objection to that,

(Testimony of J. J. Oberbillig.)

your Honor. I don't care about the original. I will accept that as being——

The Court: Very well, there being no objection, Petitioner's Exhibit 13 is received in evidence.

Mr. Carver: We have nothing further, your Honor. [110]

(Whereupon, Petitioner's Exhibit 13 for identification, witness Oberbillig, was received in evidence.)

Recross-Examination

By Mr. Picco:

Q. I direct your attention to Petitioner's Exhibit 13, which is this letter from Mr. Bradley. This has to do with the drilling by the Bureau of Mines, is that correct? A. Yes, that's correct.

Q. And it's—and you described the set-up and the way this thing happened with the Bureau of Mines in your testimony prior to this, did you not?

A. Yes.

Q. This is the matter that he is talking about here? A. That's it exactly.

Mr. Picco: That's all, your Honor.

Mr. Carver: We have nothing further.

The Court: Very well, you may stand aside, sir.

Mr. Carver: That's all, Mr. Oberbillig.

The Witness: That's all?

(Witness excused.)

Mr. Carver: We have no further witnesses. Petitioner rests.

(Petitioner rests.)

Mr. Picco: Respondent rests.

(Respondent rests.) [111]

The Court: Very well, what is your pleasure in regard to time for filing briefs?

Mr. Picco: If your Honor please, I am just wondering whether you would entertain a motion at this time to withdraw Respondent's Exhibit 8, which is the income tax return for 1943, for the purpose of photostating it and returning it within twenty-four hours?

The Court: Oh, yes, you can withdraw it at any time now, and substitute that—if you want to substitute it before we leave——

Mr. Picco: Yes, I would like to do that now, if possible.

The Court: Very well.

Mr. Carver: If the Court please, in that connection, we would ask leave, if it is agreeable with counsel, to physically withdraw—give us a chance to copy it, Exhibit Number 10, and then to return it to the files. It would take us a little longer.

The Court: Typewritten copy?

Mr. Carver: Yes.

The Court: Substitute a typewritten copy?

Mr. Carver: That is right.

The Court: If you will permit counsel to check and see that it is correct, that is satisfactory.

Mr. Picco: Yes. I am perfectly satisfied that they would do nothing to the document that they would want to take out. In fact, it might be agreeable, if you are going to permit that it be withdrawn

as a physical exhibit, that it be used by both parties [112] in connection with their briefs, and then returned to the Court, if that is agreeable?

The Court: That would be perfectly all right. You can withdraw it——

Mr. Picco: Would it be all right to take that out now?

The Court: Yes, you can withdraw it now, but if you are going to have it copied, I would just have it typed and filed while I am still here.

Mr. Picco: Do you plan to send that copy down?

Mr. Carver: Well, it would not be possible, if your Honor please, I won't be back in my office until next Monday.

The Court: Oh, I see.

Mr. Carver: So I would like leave, in connection with what counsel said, withdraw it physically for use in preparing the briefs, and then further——later——

The Court: File the same——

Mr. Carver: The same document.

The Court: ——the same document.

Mr. Carver: Yes, sir.

The Court: Very well, that may be done. My only request is that it be returned to our files as soon as possible.

Mr. Carver: Yes.

Mr. Picco: As I understand it, he will use it for his brief and then see that I get a copy?

Mr. Carver: I will give it to you. [113]

The Court: Well, I don't know if it should be kept out until brief date. I would prefer that you——

Mr. Carver: I will have it copied, then, your Honor.

The Court: —I would prefer that you have it copied and sent in.

The Clerk: Will counsel please sign a receipt for an exhibit—

The Court: And do you anticipate that you will file a copy before Wednesday of next week, or will you mail it into Washington?

Mr. Carver: I will have it in by Wednesday of next week.

The Court: Very well, you can hand it to the Clerk. The Court would like to have consecutive briefs in this case.

Mr. Picco: I was just wondering, your Honor—I have gone along with you for the last two days on that. I am going to find myself waiting for these briefs to come in, and they will all come in at the same time. I would prefer to start working on one of these briefs. I don't operate so good when I don't know what the other—I know I will probably wait for these other briefs. I wonder if you could make an exception in this case?

The Court: I don't object to simultaneous briefs in stipulated cases, but I don't like them in cases where we have testimony and findings of fact based on testimony. I like to have the Petitioner make his findings of fact and then the Respondent to [114] call whatever attention his disagreement may be with the Petitioner's findings of fact and give the Court some assistance in that regard. I will give you plenty of time on your briefs, as far as that is con-

cerned.

Mr. Picco: All right, your Honor. I may have to ask for an extension.

The Court: And if you have to have an extension, you can get an extension. How much time for your original brief, Mr. Carver?

Mr. Carver: I am not familiar with the practice, your Honor. Sixty—if sixty days would not be too long, I would appreciate that much time.

The Court: How much time do you want after you receive his brief, Mr. Picco? Forty-five days?

Mr. Picco: How many?

The Court: Would you want forty-five days?

Mr. Picco: I would like forty-five days.

The Court: Well, what will sixty days fall on?

The Clerk: July 2nd, your Honor.

The Court: Petitioner's original brief to be filed on or before July 2nd; and what will forty-five days after that be?

The Clerk: August 16.

The Court: Respondent's answer to be filed on or before August 16th; and twenty days from that date.

The Clerk: September 5. [115]

The Court: Petitioner's reply brief to be filed on or before September 5th. Now, gentlemen, make a note of those dates so that—

Mr. Carver: Yes, we have them.

The Court: —you will have them. Now, if there is nothing further, gentlemen, we will be recessed until 10 o'clock tomorrow morning.

Mr. Carver: Thank you, your Honor.

Mr. Picco: Thank you, your Honor.

(Whereupon, at 3:50 o'clock p.m., the hearing in the above-entitled petition was [116] closed.)

[Title of Tax Court and Cause.]

CERTIFICATE

I, Ralph A. Starnes, Chief Deputy Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 25, inclusive, constitute and are all of the original papers on file in my office as called for by the "Designation of Contents of Record on Review," including exhibits 1-A thru 5-E attached to the stipulation of facts, Petitioner's Exhibits 6 thru 13, admitted in evidence and Respondent's Exhibit H (F and G marked for identification and not offered), in the case before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court has filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 12th day of April, 1957.

[Seal] /s/ RALPH A. STARNES,
Chief Deputy Clerk, Tax
Court of the United States.

[Endorsed]: No. 15528. United States Court of Appeals for the Ninth Circuit. United Mercury Mines Company, a Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of the Tax Court of the United States.

Filed: April 26, 1957.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals for the
Ninth Circuit

Docket No. 15528

UNITED MERCURY MINES COMPANY, a Corporation,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DESIGNATION OF RECORD
FOR PRINTING

Appellant hereby designates that the whole of the record including the transcript of the testimony is to be printed; Appellant further designates that the exhibits contained in the record are not to be

printed and requests the Court to consider all the exhibits in their original form.

Dated this 31st day of May, 1957.

/s/ JOHN A. CARVER, JR.,

/s/ DALE CLEMONS,

Attorneys for Appellant.

Certificate of service attached.

[Endorsed]: Filed June 3, 1957.

[Title of Court of Appeals and Cause.]

CERTIFICATE OF SERVICE

State of Idaho,
County of Ada—ss.

Dale Clemons, being first duly sworn, deposes and says:

That he is one of the attorneys for appellant in the above-entitled cause, and hereby certifies that on the 31st day of May, 1957, he served a copy of the Designation of Record for Printing upon the respondent by mailing a copy of such Designation of Record for Printing to John Potts Barnes, Chief Counsel, Internal Revenue Service, P. O. Box 3935, Portland, Oregon, attorney for the respondent above named; that he mailed the same by depositing said copy in an envelope directed to the address stated herein and affixed sufficient postage thereon and mailed the same in the United States Post Office at

Boise, Idaho; that all of the above and foregoing was done on the 31st day of May, 1957.

/s/ DALE CLEMONS.

Subscribed and Sworn to before me this 31st day of May, 1957.

[Seal] /s/ ROBERT W. GREEN,
Notary Public for Idaho,
Residing at Boise, Idaho.